United States Court of Appeals

for the Second Circuit

APPENDIX

76-7475

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOSEPHINA DUCHESNE, as administratrix of the estate of Pauline Perez, et. al.

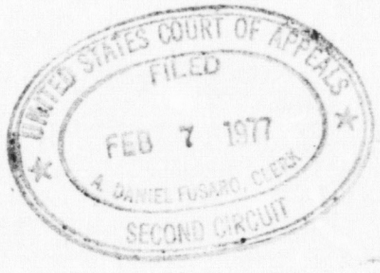
Plaintiffs-Appellants

-against-

JULE M. SUGARMAN, et. al.

Defendants-Appellees

Appendix to APPELLANTS' BRIEF



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APPELLANTS' APPENDIX

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A P P E N D I X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPHINA DUCHESNE, et al.,

Plaintiffs,

-against-

72 Civ 3447

JULE M. SUGARMAN, et al.,

Defendants.

STATEMENT OF EVIDENCE
Revised In Accordance
With District Court Order
of January 24, 1977

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UNITED STATES DISTRICT COURT
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Defendants.

STATEMENT OF EVIDENCE

PURSUANT TO R 10(c)
F.R.A.P.

72 Civ 3447

The trial transcript of the within action conducted on April 21, 1976 through April 26, 1976 is not available because Appellants are indigents and unable to pay the cost of the transcript, therefore, Plaintiffs pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure, and pursuant to an Order of the United States Court of Appeals, Second Circuit, dated September 14, 1976, herewith submit for settlement a statement of the evidence adduced, arguments of Counsel together with objections made thereto and the rulings of the Court.

JAMES R. PRINCELER testified to the following:

1. That he is a supervisor at the Bureau of Child Welfare (hereinafter BCW) and that he has been employed by BCW for approximately ten years, and that in December, 1969, he was a unit supervisor in the Intake Section of BCW.

2. That the function of BCW is to provide care for families and children in need in New York City and that as part of that function BCW provides placement for children outside their homes when necessary.

3. That the primary goal of BCW is to return children in placement to their families as soon as possible and to strengthen family ties and to involve parents in the planning for the children.

4. That placement of children occurs as a last resort, and that generally placement occurs only if relatives or friends in the community are unable to care for a child.

5. That emergency placements are defined as placements which occur in a crisis situation and that emergency placements are fairly common, and that approximately three emergency placements occurred in his unit each week.

6. That emergency placements sometimes occur in the absence of written parental consent and in the absence of a court order. That placements should not occur without written parental consent or a court order, but that sometimes such placements did occur. That the policy of BCW, as communicated to the caseworker through, inter alia, training sessions, memoranda, and

direct supervision required that parental consent or a court order be obtained prior to placement.

7. That in his work at BCW he had not seen, nor did he have knowledge of any written instructions regarding follow-up procedures which should be taken by BCW when a child was placed without written parental consent or a court order.

8. That in general procedures for emergency placements varied on a case by case basis.

9. That BCW had the authority to assign homemakers to a family for the purpose of providing child care and for the purpose of assisting a parent who was ill or otherwise unable to care for a child and was present in the home. That homemaking service is used from time to time by BCW as an alternative to placement.

10. That the term "major case work responsibility" refers to the plan that one child care agency having custody of one of several children in a family will be assigned the major duty of planning for all the children in that family.

11. That in December of 1969 the Manhattan Intake Division of BCW consisted of 10-12 units, each of which contained 4 to 5 caseworkers. That the average caseload per worker was 15 to 20 cases, and that each worker was assigned approximately one new case a week. That there were intake units in boroughs other than Manhattan.

12. That although he had no independent recollection of the case, the facts as reflected in the case record indicate

that BCW had determined that there was a lack of available resources in the community to care for the children and that placement was required in order to insure their safety and welfare.

13. That it was the responsibility of the assigned caseworker to effect a placement.

14. That the record indicates that the case was transferred to the Division of Inter-Agency relations (DIAR) in May 1970 and that such transfer was appropriate because the child-care agencies with whom the children had been placed would be in the better position to evaluate the total situation and formulate a plan for the entire family.

ELIZABETH BEINE testified to the following:

1. That she was the Director of the Bureau of Child Welfare for the five boroughs of New York City for a period of approximately 13 years, and that she was the Director during 1969, 1970, 1971 and 1972. That as Director she was responsible for the overall operation and supervision of BCW.

2. That the primary goal of BCW is to maintain families and to assume custody of children who are in need of placement, and when placement occurs the goal is to plan for the reunification of the family at the earliest possible opportunity.

3. That placement of children outside their families is used only as a last resort. That BCW will try to have a child cared for by relatives or responsible friends in the community if at all possible.

4. That when placement occurs it is BCW's goal to strengthen family ties, to involve the parents in planning for the child, and to maintain sibling relationships.

5. That BCW assumes custody and supervision of children on behalf of and as an agent for the Commissioner of Social Services (hereafter referred to as Commissioner), and that BCW is ultimately responsible to the Commissioner.

6. That Jule Sugarman was Commissioner during 1970, 1971 and 1972.

7. That Commissioner Sugarman had ultimately legal authority and responsibility for the operations of BCW, and that she reported to Commissioner Sugarman.

8. That the Commissioner was required by statute to investigate and supervise the children in placement, and that the Commissioner retains overall control of children in placement, and that the Commissioner has the statutory authority to remove a child from placement at any time.

9. That major case work responsibility refers to the process whereby one child care agency is assigned the major responsibility for planning for all the children in a family although some of those children may reside in other child care agencies.

10. That BCW suprevises the child care agencies and receives reports from them periodically.

11. That the Inter-Agency Manual of Policies and Procedures (hereinafter Manual) sets forth procedures to be used by BCW and child care agencies, and that she oversaw and reviewed amendments to this Manual, which was formulated by members of her staff and that she had on occasion personally contributed amendments and additions to this Manual.

12. That BCW is authorized to place children when there is a court order, when there is written parental consent, or when there is an emergency situation.

13. That when custody of a child is assumed as a result of parental consent the parent signs a form consent which is known as a form 864.

14. That emergency placements occur quickly and usually arise out of a crisis situation where no one is available to provide care for a child. That sometimes emergency

placements occur without obtaining either a written parental consent or a court order.

15. That to her knowledge emergency placements which occur in the absence of a court order or a written consent can continue indefinitely until BCW deems that the emergency no longer exists. That BCW is authorized to continue a placement so long as it judges that placement is in the best interest of the child, regardless of whether there is a court order or written consent.

16. That about 50% of the placements handled by BCW are emergency placements.

17. That the Manual does not set forth specific follow-up procedures to be taken where custody of a child is assumed without either written parental consent or a court order, although it was BCW policy and practice to obtain parental consent whenever possible or seek a court authorization when appropriate. BCW assumed custody of the children where there was a written parental consent, or where there was a court order authorizing placementor where, in the absence of either written consent or court order, it was BCW's judgment that the welfare and best interests of the child requried that custody be assumed.

18. That she had no personal knowledge of the placement of the infant plaintiffs, nor did she personally participate in the effectuation or continuation of the placement.

19. That the long-term placement of these infant plaintiffs without written consent or court oreder was the first

case of such kind ever to be brought to her attention and that such notice was provided only by way of the allegations of the complaint in this action.

SEYMOUR FASS testified to the following:

1. He has been an employee of BCW for approximately 22 years, and in January, 1972, he became Director of the Manhattan Richmond field office at BCW and as Director he was responsible for the overall operation and supervision of that field office. That previous thereto and during 1969, 1970 and 1971 he was a Senior Supervisor in the Division of Foster Home Care, a unit of BCW wholly apart form the Intake Section and DIAR. That as Director of the Manhattan-Richmond Field Office he had no jurisdiction or responsibilities referable to cases within DIAR.

2. That BCW is authorized to assume custody of children where a parent has signed a written consent, where there is a court order, or where BCW deems an emergency exists warranting the placement of a child.

3. That an emergency placement can occur regardless of whether there is a court order or written parental consent and that such an emergency placement can continue as long as BCW deems that the emergency continues to exist.

4. That in an emergency BCW is authorized to place a child and to continue that placement so long as BCW judges that placement is in the best interest of the child.

5. That emergency placements are fairly common.

6. That he has no knowledge of any written guidelines or regulations which set forth specific follow-up steps to be taken where BCW places a child without a court order or a written parental consent authorizing such placement.

7. That a relatively small number of emergency placements are effected without parental consent or court order, and that the bulk of that number consist of abandoned children and children whose parents are hospitalized. That in such cases BCW has a primary duty to provide care and shelter to children in need thereof.

8. That disagreements between a parent and BCW as to the discharge to the parent of a child in placement are quite rare, that the contemplated procedure in such instances, as reflected in the Manual, was for the parent whose request for discharge had been denied to seek recourse in court by way of a habeas corpus proceeding.

9. That he was not personally involved with, nor personally responsible for the placement or continued custody of the infant plaintiffs. That he had no personal knowledge of such placement or retention of custody.

DORIS WHITEMORE testified to the following:

1. That she is employed as a supervisor at St. Joseph's Home for Children (hereinafter St. Joseph's) and that she has been so employed since 1970.

2. That as part of her duties as supervisor she held weekly case conferences with the social workers whom she supervised and that she periodically reviewed the case files in connection with her duties as supervisor.

3. That she supervised the case of Daniel Cruz (hereinafter Daniel) during 1970, 1971 and 1972. That Ms. Colonna was the case worker for Daniel Cruz from 1969 until September 1971 and that she supervised Ms. Colonna. That neither she nor Ms. Colonna speak Spanish.

4. That Pauline Perez, the mother of Daniel Cruz, had not signed a form 864 authorizing placement and that prior to March 1972 there was no court order authorizing placement.

5. That when she learned that Pauline Perez had not signed a written consent authorizing placement no action was taken by St. Joseph's.

6. That Pauline Perez periodically requested the return of Daniel Cruz and Marisol Lopez during 1970, 1971 and 1972.

7. That St. Joseph's received copies of letters from the Lower Manhattan Aftercare Clinic dated April 29, 1970 and May 26, 1970 respectively.

8. That the St. Joseph's record shows that Daniel Cruz made a home visit in June, 1970 and in August, 1970, and that these visits went well, and that in August, 1970 Daniel and his mother requested that he be permitted to remain at home.

9. That St. Joseph's planned to permit Daniel to return to live in his mother's home in September, 1970, but that this plan was not implemented at the last minute because on the eve of returning to his home Daniel reported to St. Joseph's that he was afraid to return home.

10. That the case filed indicates that Pauline Perez and her father Miguel Perez notified St. Joseph's in person that Miguel Perez had come to New York from Puerto Rico for the purpose of assisting Pauline Perez with the care of her children.

11. That the St. Joseph's record demonstrates that in January, 1970, Josephina Duchesne, Daniel's maternal grandmother, requested that she be permitted to care for Daniel.

12. That the St. Joseph's record indicates that in December, 1971, St. Joseph's concluded that it would be impossible to get Pauline Perez to sign a form 864 consent to the placement.

13. That St. Joseph's had major case work responsibility for Daniel Cruz and Marisol Lopez.

14. That the St. Joseph record indicates that Daniel expressed interest and affection for his sister Marisol

who resided at New York Foundling Hospital, but that during the period of December, 1969 to August, 1972 there were no visits between Daniel and Marisol.

15. That she is familiar with the Inter-Agency Manual on Policies and Procedures.

16. That St. Joseph's sends periodic reports to BCW regarding the children in its care.

17. That to her knowledge Pauline Perez did not have a telephone.

CAROLINA GORBEA testified to the following:

1. That she was employed as a supervisor by the New York Foundling Hsopital for approximately ____ years. That after Marisol Lopez was transferred to a foster home in September, 1971, she supervised Marisol's case.

2. That New York Foundling Hospital is authorized to assume custody of children when there is a court order or where there is written parental consent.

3. That in emergency situations, New York Foundling is authorized to assume custody of children in the absence of a court order or a written parental consent so long as New York Foundling Hospital judges that such action is in the best interest of the child.

4. That New York Foundling Hospital is authorized to continue custody of a child so long as it judges that an emergency situation exists, despite the absence of a court order or written parental consent. That custody of a child can continue without a court order or without written parental consent so long as New York Foundling Hospital judges that continued placement is in the best interest of the child.

5. That she is familiar wit the Inter-Agency Manual of Policies and Procedures and that she consulted it in the course of her work as a supervisor.

JOSEPHINA DUCHESNE testified to the following:

1. That she speaks only a very little English and that she has difficulty understanding it. That she is Spanish-speaking and requested an interpreter for her testimony.

2. That Pauline Perez was primarily Spanish-speaking, but that she did speak a little English.

3. That she is the mother of Pauline Perez.

4. That in December, 1969, she lived within a few blocks of Pauline Perez.

5. That in 1969 she saw Pauline Perez frequently and often daily, and that it was their custom to visit back and forth in one another's apartments.

6. That in 1969 Daniel Cruz attended a public school which was located across the street from Josephina Duchesne's apartment, and that Pauline Perez would walk Daniel Cruz to school in the morning and pick him up in the afternoon.

7. That Pauline Perez was attentive and affectionate to her children and that Pauline Perez was a good homemaker.

8. That she did not go to Puerto Rico in December, 1969, nor did she go to Puerto Rico at any time in 1969.

9. That no employee or agent of BCW or any agency came to her home on or about December 17, 1969 and asked her if she would take custody of Daniel Cruz and Marisol Lopez.

10. That in January 1970 she asked the St. Joseph's social worker who was visiting Pauline Perez at Bellevue Hospital

if Josephina Duchesne could take Daniel Cruz to live in her home. That the St. Joseph's social worker said that an answer to the request would be given, but that no answer, nor explanation for the denial of the request was given to Josephina Duchesne.

11. That at the time she requested that Daniel be permitted to live with her she was unable to take custody of Marisol because Marisol was only an infant of 6-7 months and Josephina Duchesne was employed, and took care of her aging parents and also took care of her own children, who at trial her children were 20, 28 and 29 respectively. Therefore Josephina Duchesne was not able to care for the infant Marisol.

12. That at the time that she requested that Daniel be permitted to live with her Daniel would have been able to attend the same school which he had attended before he had been taken to St. Joseph's and that that school was located directly across the street from Josephina Duchesne's home.

13. That during 1970, 1971 and 1972 she saw her daughter Pauline Perez frequently and that Pauline Perez consistently spoke of her attempts to regain custody of Daniel and Marisol and that Pualine Perez often cried when she returned from visits with the children and always spoke about how sad she felt because she was not allowed to have custody of her children.

14. That she had visited Daniel Cruz and Marisol Lopez with Pauline Perez. That the trip to visit Daniel Cruz took an entire day including the subway ride to the bus or train and the ride to St. Joseph's by the bus or train. That

it was the practice of Pauline Perez to bring a picnic lunch and that Pauline Perez would often bring a little toy or piece of clothing to her children. That Daniel appeared happy to see Pauline Perez during the visit, and that Marisol also appeared happy but that it was more difficult to discern her reaction as she was a very young child. That after these visits with the children Pauline Perez was always sad and distressed and spoke about her desire to have her family reunited.

15. That prior to going to St. Joseph's Daniel Cruz spoke Spanish. That Daniel Cruz is no longer able to speak Spanish and consequently she and the other Spanish-speaking members of her family are unable to converse with Daniel without a translator.

MIGUEL PEREZ testified to the following:

1. That he is the natural father of Pauline Perez and that he was in Puerto Rico in December 1969 when the children were placed.

2. That after Pauline Perez learned that the children had been placed in institutions she wrote to him in Puerto Rico.

3. That in 1970 he came to New York from Puerto Rico for the express purpose of assisting Pauline Perez with the care of her children.

4. That after he came to New York in 1970 he went with Pauline Perez to St. Joseph's and New York Foundling Hospital to introduce himself and to tell the social workers of those institutions that he had come to New York to help his daughter with her children and that if the children were returned to Pauline Perez he would do whatever was required to assist her with the care of the children including living with Pauline Perez and the children if necessary.

5. That there was no response to his requests to help with the care of the children, and that he was never contacted by the institutions regarding his offer.

6. That he does not speak English and that he only speaks Spanish.

7. That Pauline Perez spoke some English, but that she mainly spoke and understood Spanish.

8. That he visited the home of Pauline Perez before

her children were taken to the institutions and that she kept a good and clean home, that she cooked for the children and gave them the care and attention which they needed.

9. That in 1970 and 1971 he visited the children with Pauline Perez and that Daniel seemed pleased to see his mother. At the end of the visits Pauline Perez was very sad and sometimes cried and often spoke of how she missed the children and wanted them to be returned to her.

HECTOR PEREZ testified to the following:

1. That he is the natural brother of Pauline Perez.

2. That in 1969 he lived in the home of Pauline Perez with her children Daniel Cruz and Marisol Lopez.

3. That he is the god-father of Marisol Lopez.

4. That Pauline Perez provided a good home for these two children, that she kept her home neat and gave the children the love and attention they needed.

5. That in 1969 before Daniel was taken to St. Joseph's he spoke Spanish and conversed with the family in Spanish. That at the present time Daniel speaks only English and is unable to converse with the family in Spanish.

6. That after he obtained his own apartment in 1969 he still lived in the same neighborhood with Pauline Perez and that he saw her frequently, sometimes daily.

7. That Pauline Perez visited her children regularly during 1970 and 1971 especially Marisol who was located in New York City at New York Foundling Hospital. That is was more difficult for Pauline Perez to visit Daniel who was at St. Joseph's about 40 miles from New York City.

8. That Pauline Perez spoke some English, but that her main language was Spanish which unlike English she spoke and understood fluently.

9. That he went with Pauline Perez on one occasion in November 1971 to New York Foundling Hospital. When they arrived Pauline Perez was told by an English-speaking nurse that Marisol was not there and that she had been sent to live in a

foster home. That this was the first time that Pauline Perez had been informed that Marisol had been sent to a foster home. Pauline Perez became hysterical and she started crying and saying that the hospital had no right to take her daughter. He tried to calm Pauline Perez because she did not understand what had happened. She said that she thought and feared that her daughter Marisol had been adopted.

DR. MICHAEL SMITH testified to the following:

1. That he is a qualified psychiatrist licensed to practice in the State of New York and that he is presently employed at the Lincoln Hospital, Bronx, New York. (Dr. Smith was qualified as an expert witness).

2. That on December 9, 1975 he had examined Pauline Perez and the Bellevue Hospital and Lower Manhattan Aftercare Clinic records for Pauline Perez. That this examination was arranged as a result of a request by the attorney for Pauline Perez, and that it was understood at the time of the examination that if the results were supportive of plaintiffs' position in the within action he would be called to testify at the trial by plaintiffs.

3. That it was his opinion that in 1970 when her treating psychiatrist recommended that she was able to care for the children that Pauline Perez would have been able to provide adequate parental care for the children.

4. That it was his opinion that her failure to obtain the return of her children caused Pauline Perez to suffer stress and anxiety and pain which interfered with her ability to maintain a stable condition.

5. That it was his opinion that the stress caused by the refusal to return the children contributed to the hospitalizations suffered by Pauline Perez and with respect to this he made particular reference to the hospitalization in the latter part of 1970 and to the hospitalization in or about November 1971, and that his opinion concurred with the following

notations in the Bellevue Hospital record:

> "Mild paranoid schizophrenia - this woman's situation is exacerbated by conflict with her man over marriage and her desire to have her children at home. She attempts to solve these problems unsuccessfully by relying on her religion. (Exhibit 3, Continuation Record, 10/31/70, A at p. 63)
>
> and
>
> Plan: Admit for evaluation. Some social service support and clarification of issue with child would be helpful. This action will forestall any serious suicidal threat at this time in this woman who obviously cannot cope with current situation (Exhibit 3, Admission Record, 11/11/71, A at p. 64).

6. That in his opinion, based on his examination of, inter alia, the Bellevue Hospital records of some sixteen (16) hospitalizations from 1960 to March 1972, Pauline Perez was suffering from chronic schizophrenia and that she had been suffering from that illness from 1960 to 1972, thus inclusive of that period prior to the birth of her first child in 1962. That he adhered to this opinion even though Ms. Perez had been hospitalized intermittenly for mental illness since 1960, some 9 years prior to the placement of the children.

7. That schizophrenia is a condition which can have substantial periods of remission where the person is free of any symptoms. That it is possible for schizophrenics to function adequately and responsibly, and that a person with schizophrenia can function as a competent mother.

8. That Pauline Perez had four children each fathered by four different men, without marriage to any of them.

Plaintiffs introduced into evidence the following portions of defendants' deposition of Pauline Perez which was taken on November 19, 1975:

Q. [Mr. Magovern] Do you recall the time when Danny left your care?

A. [Pauline Perez] Yes.

Q. When was that?

A. 1969.

Q. Do you know what month that was?

A. In December.

Q. What are the circumstances under which Danny left your care?

A. Well, because I got sick from my nerves, and then I went to my next door neighbor's house. She was very responsible for children, so I went there. And I said to her to take care of my children while I was going to the hospital, and I though I would be coming back to pick up the children.

And so then they left me at the hospital. So then she, the following day, called Welfare, and they took away my children.

Q. Do you recall name of the neighbor?

A. Lily.

Q. How long had you known Lily?

A. Two years.

Q. When was the last time you saw Lily?

A. From now?

Q. Yes. When was the last time you saw Lily?

A. Well, I saw her last year.

Q. Had you left your children with Lily before?

A. I sometimes took care of her children. Sometimes she would leave her children with me for me to take care of them. And I would take care of her children, and then she would take care of mine whenever I would have to go out. She went to my house every day.

Q. Do you recall when this was, when you became nervous and when you left your children with Lily?

A. Well, in 1969.

Q. Do you recall what month and what day, approximately?

A. I don't remember the day, but I do remember the month. It was the month of December.

Q. You say you went to the hospital at this time?

A. Yes.

Q. Were you taken to the hospital or did you go on your own?

A. The ambulance came.

Q. What hospital were you taken to?

A. To Bellevue.

Q. Did you call the ambulance or did someone else call the ambulance?

A. Lily called the ambulance.

Q. How long were you at Bellevue Hospital at this time?

A. Fifteen days. When I returned, they had taken the children away. (pp 7-10)

* * *

Q. Do you know what the doctor was treating you for?

A. They were treating me to see what was wrong with me.

Q. You said you were hospitalized for nerves, for being nervous.

A. Yes. (p. 11)

* * *

Q. When you were discharged, were you given any medication to take, or were you referred to eithe the Bellevue Clinic or any other community clinic for further treatment?

A. Well, they didn't give me any medication. However, they did send me to Fourth Avenue and 17th Street. (p. 12)

Q. You said you were hospitalized in December. Do you recall what day of the week that it was that you were hospitalized on?

A. No. I don't remember.

Q. Was it in the morning or in the evening?

A. The first time I went to the hospital?

Q. Yes.

A. Well, it was at night.

Q. Was it late at night or was it early in the morning after 12:00 o'clock?

A. Late at night.

Q. After you were discharged after fifteen days at Bellevue you returned home, is that right?

A. Yes.

Q. When were you next hospitalized?

A. About two days afterwards. (pp. 13-14)

* * *

Q. When were you next hospitalized after this second hospitalization?

A. Well, I have been to Bellevue many times . . . (p. 15)

* * *

Q. Do you recall when the next year, or how many months after your second hospitalization at Bellevue that you were again in any hospital or facility?

A. Well, it was in 1970.

Q. What was the institution or hospital?

A. Bellevue.

Q. Was that the only hospitalization in 1970 or were there others?

A. I went many times to Bellevue, . . . (p. 16)

* * *

Q. Were you hospitalized in 1971?

A. I don't remember if I was hospitalized or not. I know that I have gone to 30th Street many times . . . (p. 17)

* * *

Q. Prior to your going to the hospital in December of 1969, you said you spoke to your neighbor Lily, is that right?

A. Yes.

Q. What did you tell Lily as to how long you would be away or when you would be returning for the children?

A. Since I thought I would be returning right back, I told her that I'd be coming back the same day, but then, since they left me there in the hospital --

Q. So that is the end of the answer. So you told Lily that you would be back the next day, is that right?

A. No, that I would be back the same day. And I told Lily not to give the children to anybody.

And she called Welfare without telling me that she was going to put the children in school.

Q. You were nervous and that was the reason that you went to the hospital when the children were with you, right?

A. No, I wasn't so nervous because I had my children with me at the time, but I felt a bit sick. That's why I called the ambulance.

Q. Did you call the ambulance or did Lily call the ambulance?

A. I told Lily to call the ambulance.

Q. You told her to call the ambulance because you were feeling nervous, right?

A. Nervous, but not nervous like sick.

Q. Were you physically sick or did you have a fever? What specific ailment caused you to tell Lily to phone for an ambulance?

A. Because I felt sick. (pp. 25-27)

* * *

Q. You said you spoke to a Miss Colonia. Do you know who Miss Colonia works for?

A. She worked for Danny.

Q. Did you speak to anyone other than Miss Colonia when you were in the hospital at that time?

A. No

Q. How many times did you speak with Miss Colonia?

A. Once.

Q. And that was the first few days that you were in the hospital, is that right?

A. Yes.

Q. What exactly did Miss Colonia tell you?

A. What did I say to her?

Q. No. What did Miss Colonia say to you?

A. That the children were going to be until such a time as I was discharged from the hospital, but that afterwards, they would be returned to me.

Q. What did you say to her?

A. I told her if that was the case, that was all right, but that if it was otherwise, no, because I needed my children. And I would need my children returned to me. (pp. 27-28)

* * *

Q. After you left the hospital in 1970, did you ask for the return of your children to you?

A. Of course.

Q. To whom did you make this request?

A. To the social worker.

Q. Could you tell us what the name of the social worker was that you made this request to?

A. I went to 68th Street, to the Foundling, and asked there.

Q. What was the name of the social worker you spoke to

A. I don't remember.

Q. Did you make that request to any other person?

A. Miss Colonia. And Mrs. Whitamore.

Q. Were there any other persons that you spoke about your children with?

A. Every time the social worker is changed, I ask each time for the children to be returned, and they are not returned. (pp 31-32)

* * *

EXAMINATION BY MR. STEINBERG:

Q. Miss Perez, during your hospitalization in December of 1969 at Belle did you speak to anyone regarding the status of your childi ., other than Miss Colonia?

A. No.

Q. In the early part of 1970, during any time right after you got out of the hospital, did you speak to anyone regarding the status of your children other than Miss Colonia?

A. I went to the Foundling to see Marisol. I spoke with Mr. Fernandez. I spoke with Mr. DeSeepio.

I spoke with another social worker. I don't remember his name. I spoke with Mrs. Whitamore in Peekskill. I spoke with Mrs. Colonia. I have spoken with the new social worker now.

Q. Did you ever speak to any social workers or any employees

of the Bureau of Child Welfare for the City of New York?

A. Yes.

Q. Who did you speak to?

A. I don't remember very well. I has been a long time, and I have had shock treatments.

Q. Do you recall when you spoke to them?

A. I don't remember.

Q. Do you remember if the social workers who you dealt with from the Bureau of Child Welfare, were they male or female?

A. It was a man. (pp 34-35)

* * *

MR. MAGOVERN: I have another question.

BY MR. MAGOVERN:

Q. Miss Perez, we have been using an interpreter from the very beginning.

You do not speak only Spanish, correct? You speak some English, don't you?

A. Yes, but sometimes I don't understand what you are saying. Sometimes I understand, you know. That's right, I would like to have the interpreter because I answer better the question. (p.39)

EXHIBITS

The following documents were introduced into evidence:

1. The Bureau of Child Welfare case record on Pauline Perez, Daniel Cruz and Marisol Lopez.

2. Inter-Agency Manual of Policies and Procedures.

3. The Bellevue Hospital case record on Pauline Perez.

4. The Lower Manhattan Aftercare Clinic case record on Pauline Perez.

5. The St. Joseph's case record on Daniel Cruz.

6. The New York Foundling Hospital case record on Marisol Lopez.

MOTIONS AND ARGUMENTS BY PLAINTIFFS' COUNSEL

1. Motion for the Court to take judicial notice of the New York Family Court Act and the New York Social Services Law.

2. The District Court held that the complaint was brought under the Civil Rights Act and did not allege violations of State Civil Rights statutes or any New York Statutes.

3. Motion to introduce into evidence documentary evidence in the agency case files regarding the care of Edward Soto, the son of Pauline Perez.

4. Application to have a Spanish interpreter during the testimony of Josephina Duchesne.

RULINGS BY THE DISTRICT COURT

1. Denied Plaintiffs' application to take judicial notice of the New York Family Court Act and New York Social Services Law.

2. Ruled that Plaintiffs' complaint failed to allege a cause of action under New York State law.

3. Denied Plaintiffs' application to introduce any evidence regarding proceedings in New York State Courts by or against Pauline Perez.

4. Denied Plaintiffs' application to introduce into evidence information regarding Pauline Perez's son, Edward Soto, and Pauline Perez's care of Edward Soto on the ground that he was a non party, was not referred to in the complaint and was outside the time period of the pleadings.

5. Held that "it seems clear to the Court that the children should be designated as destitute (Social Services Law §371(3)) since abandonment and neglect imply improper acts on the part of the parent." (Decision dated April 26, 1976)

6. Mrs. Duchesne commenced her testimony without aid of an interpreter, despite plaintiffs' counsel's request. When Mrs. Duchesne encountered difficulty the Court permitted Mrs. Duchesne to use an interpreter. Mrs. Duchesne periodically answered questions in English and frequently answered questions before they were interpretated to her.

7. At the close of plaintiff's case the court ruled that

there was no evidence whatsoever that the City defendants Beine, Fass, Sugarman had any knowledge of plaintiff Perez or her children, either personal or constructive and therefore dismissed the complaint against them.

8. At the close of defendants New York Foundling Hospital and St. Joseph's Home of Peekskill's case, the court ruled on defendants' motion for dismissal (Decision dated April 26, 1976) and the court held that the fourth cause of action even construed most favorably for plaintiff alleged the tort of infliction of mental distress and so charged the jury.

9. No motions were made to set aside the verdict.

MOTION AND ARGUMENTS BY COUNSEL FOR
DEFENDANTS SUGARMAN, BEINE AND FASS

1. Motion at the close of Plaintiffs' case for dismissal of the complaint as to these defendants for failure to state a claim upon which relief can be granted, and, specifically, that the evidence adduced failed to demonstrate the personal involvement or responsibility of any of these defendants in the actions alleged in the complaint.

RULINGS BY THE DISTRICT COURT.

8. Granted the motion of the defendants Sugarman, Beine, and Fass and dismissed the complaint as to said defendants.

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

PAULINA PEREZ, individually and on behalf of her infant children DANIEL CRUZ and MARISOL LOPEZ, Plaintiffs - against - JULE M. SUGARMAN, individually and as Commissioner of New York City's Human Resources Administration; ELIZABETH BEINE, individually and as Director of Child Welfare Services in the New York City's Bureau of Child Welfare; SEYMOUR FASS, individually and as Director of the New York City's Bureau of Child Welfare, Manhattan Section; JAMES R. PRINCELER, individually and as case-worker and agent of the New York City's Human Resources Administration; New York Foundling Hospital; and St. Joseph's Home for Children, Defendants.	COMPLAINT Civil Action No. 72 Civ 3447 (cm)

PLAINTIFFS, BY THEIR ATTORNEY, ALLEGE AS FOLLOWS:

I

PRELIMINARY STATEMENT

1. This is an action for damages and declaratory relief to redress the deprivation under color of state law of rights, privileges, and immunities secured by the Constitution of the United States.

2. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1343(3) and (4), providing for original jurisdiction in the courts of the United States of suits authorized by 42 U.S.C. § 1983, and by 28 U.S.C. §§2201 and 2202, relating to declaratory judgments. This action arises under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983.

II

PLAINTIFFS

3. Plaintiff Pauline Perez, resides at 520 East 11th Street, New York, New York and is the mother of plaintiff Daniel Cruz, plaintiff Marisol Lopez, and Eduardo Lopez.

4. Plaintiff Daniel Cruz, age 9 years, resides at St. Joseph's Children's Home, Peekskill, New York, and is the son of plaintiff Perez.

5. Plaintiff Marisol Lopez, age three years, resides at the New York Foundling Hospital. and is the daughter of plaintiff Perez.

III

DEFENDANTS

6. Defendant Jule M. Sugarman is the Commissioner of the New York City Human Resources administration which is responsible for the supervision and regulation of the New York City Bureau of Child Welfare. As commissioner, defendant Sugarman has immediate responsibility for the direction of the Bureau of Child Welfare in removing children from their homes.

7. Defendant Elizabeth Beine is Director of Child Welfare Services in the Bureau of Child Welfare and is directly responsible for the removal of children from their homes as well as their placement in other facilities. As Director of Child Welfare Services, defendant Beine has the responsibility for requiring that all such removals and placements are conducted in accordance with law.

8. Defendant Seymour Fass is Director of the Bureau of Child Welfare, Manhattan Department, and is responsible for the lawful removal of children from their homes and placement elsewhere for the Borough of Manhattan.

9. Defendant James R. Princeler is a caseworker and employee of defendant New York City Bureau of Child Welfare and is responsible for removing and maintaining the removal of plaintiffs Cruz and Lopez from the home of their mothter, plaintiff Perez.

10. Defendant New York Foundling Hospital is a private hospital responsible for providing placement for children who have been removed from their homes. Defendant New York Foundling Hospital operating as an agent of defendant New York City Bureau of Child Welfare has been responsible for the placement of plaintiff Lopez from December 23, 1969 to the present.

11. Defendant St. Joseph's Home for Children is a private shelter and residence for children which, operating as an agent of defendant New York City Bureau of Child Welfare, has been responsible for the placement of plaintiff Cruz from December 23, 1969 to the present.

IV

FACTS

12. Plaintiff Paulina Perez is the mother of three childre plaintiffs Daniel Cruz and Marisol Lopez, and Eduardo Lopez. Until the 23rd day of December 1969, plaintiff Perez had always maintained custody over her children, and had always sought to provide them with the tender care, love and guidance that they needed and desired.

13. That on the 23rd day of December 1969, plaintiff Perez became ill and was taken by ambulance to Bellevue Hospital and was admitted. On the 23rd day of December 1969 plaintiff Perez was visited in her hospital room by one of the defendants or one of their authorized agents.

14. That this agent explained to plaintiff Perez that defendants would take custody of her two children, Daniel Cruz and Marisol Lopez, during the period of time that it would be necessary for plaintiff Perez to remain in the hospital. This agent assured plaintiff Perez that the children would be returned when plaintiff Perez was released from the hospital.

15. Plaintiff Perez was released from the hospital on February 11, 1970 and thereafter she continually and repeatedly requested from the defendants that her children be returned to her.

16. Defendants uniformedly refused to return the children to plaintiff Perez, although on various occasions they falsely promised that the return was imminent. That during the period of December 1969 to March 1972 defendants failed to obtain a court order awarding them custody of the children and failed to accord plaintiffs a hearing to challenge the children's removal from the custody of the mother. After defendants failed

to return the children, plaintiff Perez, on the first day of March 1972, brought a writ of habeas corpus in the New York Supreme Court seeking the return of her two children.

17. On the 2nd day of March 1972 defendants, in an attempt to validate their illegal detention of the children, filed a neglect proceeding in Family Court, New York County, Docket No. 704-06/72, against plaintiff Perez.

18. On the 7th day of March 1972 the Family Court ordered that the custody of plaintiffs Cruz and Lopez be continued in St. Joseph's Home for Children and New York Foundling Hospital respectively.

19. Both the neglect proceeding and the Writ of Habeas Corpus, which was transferred to the Family Court, are now pending in the Family Court.

20. That defendants have illegally detained Daniel Cruz and Marisol Lopez from December 23, 1960 until the present time. That defendants by their illegal detention of plaintiffs Cruz and Lopez have caused plaintiff Perez to suffer severe mental anguish and emotional distress which resulted in plaintiff Perez's hospitalization on several occasions during the period of the children's detention.

21. That plaintiff Perez has at no time consented to the detention of her children by defendants.

22. That defendants held these children for twenty-five months before attempting to bring the matter of detention before a court.

23. Plaintiff Perez is presently able to provide a prope home and parental affection and supervision to these children.

V

FIRST CLAIM FOR RELIEF

FOR A FIRST CLAIM FOR RELIEF, plaintiff Pauline Perez alleges as follows:

24. That defendants Sugarman, Fass, Beine, Princeler, and their agents, unlawfully deprived plaintiff of her right to the care and custody of her children plaintiff Cruz and Lopez.

25. That said defendants, upon plaintiff Perez's repeated requests and demands that said children be returned to her custody and care, refused to accede to said requests and demands and determined to maintain the illegal separation of plaintiff from her children.

26. That said unlawful deprivation of plaintiff's rights to her children commenced on the 23rd day of December 1969, and continued through the 7th day of March, 1972, when defendant Sugarman obtained an unlawful preliminary neglect order, until the present time.

27. That throughout the period December 23, 1969, to March 7, 1972, said defendants, despite their detention of the infant plaintiffs, failed and refused to obtain a court order authorizing said detention or to afford plaintiffs a hearing to contest the illegal detention of the infant plaintiffs.

28. That throughout this same period, from December 23, 1969, to March 7, 1972, and thereafter, defendants New York Foundling Hospital and St. Joseph's Home for Children detained said infant plaintiffs without consent of plaintiff Perez and with knowledge, actual or constructive, that said infant plaintiffs were being held illegally without a court order or hearing of any kind. That despite said illegal detention, said defendants refused to release said infant plaintiffs to the care and custody of their mother. In unlawfully detaining said infant plaintiffs, said defendants were acting as agents of the City and State of New York.

29. That defendants at all times were aware that plaintiffs were entitled, under the Fourteenth Amendment to the Constitution of the United States and under provisions of state law, to a hearing prior, or immediately subsequent, to termination of plaintiff Perez's custody rights over her children but that said defendants effected or maintained, or both, said termination of plaintiff's parental rights without affording her a hearing whatsoever. That defendants' actions thus deprived plaintiff of her rights to due process as provided by the Fourteenth Amendment to the Constitution of the United States and caused her damages to the extent of $25,000.00.

VI

SECOND CLAIM FOR RELIEF

FOR A SECOND CLAIM FOR RELIEF, plaintiffs Daniel Cruz and Marisol Lopez refer to and incorporate herein all of the allegations set forth herinabove and, in addition thereto, further allege:

30. That defendants have effected and maintained the separation of said infants plaintiffs from their natural mother, thereby depriving them of the love, affection, care and custody

of their parent, without consent, without a court order, and without providing to said infant plaintiffs a hearing to contest their unlawful separation.

31. That upon information and belief defendants had full knowledge, or should have had knowledge, that said separation and detention were unlawful and had been accomplished without providing a hearing to said plaintiffs.

32. That in consequence of defendants' unlawful actions, the said infant plaintiffs have been deprived of their rights to a hearing as provided by the due process clause of the Fourteenth Amendment to the Constitution of the United States, thus causing them damages to the extent of $25,000.00.

VII

THIRD CLAIM FOR RELIEF

FOR A THIRD CLAIM FOR RELIEF, plaintiffs refer to and incorporate herein all of the allegations set forth hereinabove and, in addition thereto, further allege:

33. That defendants have effected and maintained the infant plaintiffs' separation from their mother and have been unlawfully detained by said defendants, from December 23, 1969, to March 6, 1972, and from March 7, 1972, to the present time, without benefit of a hearing to enable plaintiffs, or their attorney(s), to challenge such unlawful separation and detention.

34. That in effecting and maintaining said separation and detention, plaintiffs have not been treated like others similarly situated and have been denied, without rational basis and without reason, the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States. Such denial of equal protection has caused plaintiffs damages in the sum of $20,000.00.

VIII

FOURTH CLAIM FOR RELIEF

FOR A FOURTH CLAIM FOR RELIEF, plaintiffs refer to and incorporate herein all of the allegations set forth hereinabove and, in addition thereto, further allege:

35. That defendants knew, or should have known, that the infant plaintiffs were removed from the custody of their mother without benefit of a court order and without provision of a hearing.

36. That defendants' continued detention of said infant, plaintiffs with knowledge of the illegality of said detention was intentional, wilfull, malicious and calculated so as to inflict severe mental anguish and emotional distress upon plaintiffs.

37. That said plaintiffs, as a direct consequence of said defendants'actions, did in fact suffer severe mental anguish and emotional distress and that, in addition, plaintiff Perez, as a result of said stresses and strains was hospitalized, causing plaintiffs damages to the extent of $25,000.00.

IX

FIFTH CLAIM FOR RELIEF

FOR A FIFTH CLAIM FOR RELIEF, plaintiffs refer to and incorporate herein all of the allegations set forth hereinabove and, in addition thereto, further allege:

38. That defendants have, in effecting and maintaining the detention of the infant plaintiffs, have falsely imprisoned said plaintiffs against their will, causing them damages to the extent of $25,000.00.

X

DAMAGES

39. Plaintiffs, as a consequence of defendants' unlawful actions, have suffered emotional distress and mental anguish, causing plaintiff Perez to be hospitalized, in a manner that is unlikely to be ever undone.

WHEREFORE, plaintiffs respectfully request this court to enter judgment awarding plaintiff damages in the sum of $120,000.00 against all defendants and such other additional relief as the interests of justice may require together with the costs and disbursements of this action and with attorney's fees.

NANCY E. LeBLANC, Esq.
LISA H. BLITMAN, Of Counsel
MFY Legal Services, Inc.
320 East Third Street
New York, New York 10009
Tel: 777-5250

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

PAULINA PEREZ, individually and on behalf of her infant children DANIEL CRUZ and MARISOL LOPEZ,

Plaintiffs

-against-

72 CIV 3447

JULE M. SUGARMAN, individually and as Commissioner of New York City's Human Resources Administration; ELIZABETH BEINE, individually and as Director of Child Welfare Services in the New York City's Bureau of Child Welfare; SEYMOUR FASS, individually and as Director of the New York City's Bureau of Child Welfare, Manhattan Section; JAMES R. PRINCELER, individually and as case-worker and agent of the New York City's Human Resources Administration; New York Foundling Hospital; and St. Joseph's Home for Children,

Defendants.

The defendant, Jule M. Sugarman, answering the complaint herein, upon information and belief, alleges:

FIRST: Denies each and every allegation contained in paragraphs of the preliminary statement designated "1" and "2".

SECOND: Denies having any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs of the complaint designated "3", "4", and "5".

THIRD: Denies each and every allegation contained in paragraphs of the complaint designated "6", "7", "8" and "9" and refers to the rules and regulations themselves for their contents. Except that the persons named occupy the positions described.

FOURTH: Denies each and every allegation contained in paragraphs of the complaint designated "10" and "11", insofar as it refers to the existence of an "agency".

FIFTH: Denies having any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph of the complaint designated "12".

SIXTH: Denies each and every allegation contained in paragraphs of the complaint designated "13", "14", "15", "18" and "21", insofar as the same recite evidentiary matter, which should be left for determination by the court at the trial of this action.

SEVENTH: Denies each and every allegation contained in paragraphs of the complaint designated "16", "17", "20", "22" and "23".

EIGHTH: Denies each and every allegation contained in paragraphs of the complaint designated "24", "25", "26", "27", "28" and "29".

NINTH: Denies each and every allegation contained in paragraphs of the complaint designated "30", "31" and "32".

TENTH: Denies each and every allegation contained in paragraphs of the complaint designated "33" and "34.

ELEVENTH: Denies each and every allegation contained in paragraphs of the complaint designated "35", "36" and "37".

TWELFTH: Denies each and every allegation contained in paragraph of the complaint designated "38".

THIRTEENTH: Denies each and every allegation contained in paragraph of the complaint designated "39".

AS AND FOR AFFIRMATIVE DEFENSES, THE DEFENDANT ALLEGES:

FOURTEENTH: The only possible connection between this defendant and the plaintiffs necessarily arose out of defendant's official position, and there is an absolute personal immunity in favor of the plaintiff for the impersonal, administrative, governmental, ministerial performance of his duties.

FIFTEENTH: There is presently pending, in the Family Court, a writ of habeas corpus and a neglect petition, and there is no evidence that the plaintiffs' civil rights will not be fully appreciated in that Court.

SIXTEENTH: The only possible connection between the defendant and the plaintiffs necessarily arose out of defendants' official position, and any activity on this defendant's part was entirely impersonal in nature, and defendant denies any of his actions were motivated to deprive the plaintiffs of any of their civil rights guaranteed to them by the Constitution of the United States of America or the State of New York.

SEVENTEENTH: The rules of the Family Court adequately cover the question of due process of law, and there is no allegation here that the plaintiffs were treated any differently than any other persons who come before that Court. The case appeared on the Calendar of Family Court on August 29th, 1972, and the case was adjourned until November 13, 1972, incidentally.

EIGHTEENTH: By reason of the premises, this action is not justiciable under 42 U.S.C. Section 1983, since it is not at all a civil rights case, and neither can the claim of lack of due process be made in this Court, in view of the secrecy of proceedings in the Family Court.

RV

WHEREFORE, the defendant Jule M. Sugarman demands judgment dismissing the complaint herein, with costs.

NORMAN REDLICH
Corporation Counsel
Attorney for Defendant,
The City of New York,
Office and P.O. Address:
Municipal Building,
Borough of Manhattan,
New York, New York, 10007

By SAUL BERNSTEIN
Saul Bernstein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

PAULINE PEREZ,et al,
Plaintiffs

-v-

JULE M. SUGARMAN, et al,
Defendants
and
NEW YORK FOUNDLING HOSPITAL AND ST. JOSEPH'S HOME OF PEEKSKILL,
Defendants

72 Civil Action No. 3447 (CM)

ANSWER

----------x

ST. JOSEPH'S HOME OF PEEKSKILL BY ITS ATTORNEYS, BODELL, GROSS & MAGOVERN for its answer to the complaint herein:

1. Denies paragraph 1 and 2 except admits that plaintiff purport to base this action on the provisions and statutes cited in said paragraphs and that plaintiff seeks damages and declaratory relief.

2. Denies knowledge or information sufficient to form a belief as to all other allegations in the complaint except as hereinafter specifically set forth.

3. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 3 through 9 inclusive except

(a) admits that Pauline Perez is the biological mother of the infants Daniel Cruz and Marisol Lopez.

(b) admits that Daniel Cruz is under care of the St. Joseph's Home of Peekskill.

Peekskill, New York.

(b) St. Joseph's Home is an "authorized agency" within the meaning of section 371 of the Social Services Law to provide treatment, services and care for children in need of care.

5. Denies paragraph 12 except admits Plaintiff Pauline Perez is the mother of three children, Daniel Cruz, Marisol Lopez, and Eduardo Lopez.

6. Denies paragraphs 13 through 23 inclusive except admits that:

(a) Plaintiff Pauline Perez has a long history of intermittent psychiatric hospitalizations at Bellevue Hospital as well as other hospitals.

(b) Plaintiff Pauline Perez was hospitalized at Bellevue Hospital on or about December 23, 1969 for what was later diagnosed as suicidal ideation and characterized as schizophrenia.

(c) Plaintiff Pauline Perez consented to the placement of her children with the defendants herein.

(d) a neglect proceeding was instituted in Family Court, New York County against plaintiff Pauline Perez and thereafter consolidated with a Writ of Habeas Corpus in Family Court.

(e) The Family Court on December 1, 1972 dismissed the Plaintiff Pauline Perez's Writ of Habeas Corpus and found Marisol Lopez, Edward Soto and Daniel Cruz to be neglected within the

meaning of Article 10 of the Family Court Act (copy of fact finding decision attached hereto as Exhibit A.

(f) The Family Court at a dispositional hearing pursuant to Section 10 of the Family Court Act on June 18, 1973 placed Marisol Lopez, Edward Soto and Daniel Cruz with the Commission of Social Services for eighteen months (copy of order attached hereto as Exhibit B.

7. Denies paragraph 24 through 39 inclusive.

FIRST AFFIRMATIVE DEFENSE

8. This Court lacks jurisdiction of this action.

SECOND AFFIRMATIVE DEFENSE

9. The Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

10. St. Joseph's Home of Peekskill has compiled with all the requirements of state and federal law.

FOURTH AFFIRMATIVE DEFENSE

11. The decision of the Honorable Stanley Gartenstein, Judge of the Family Court in the consolidated Habeas Corpus and neglect proceeding (Docket No. N 704-706/72 copy annexed as Exhibit A) is res judicata and bars the within action.

FIFTH AFFIRMATIVE DEFENSE

12. The rules of the Family Court adequately cover the question of due process of law. This action is not justiciable under 42 U.S.C. Section 1983, since it is not a proper civil

rights case, and neither can the claim of lack of due process be made in this Court, in view of the pendency of proceedings in the Family Court of New York County.

SIXTH AFFIRMATIVE DEFENSE

13. This Court should abstain from exercising jurisdiction over this action due to the continuing exercise of jurisdiction in the Family Court of the State of New York, New York County

Wherefore defendant, St. Joseph's Home of Peekskill, demands judgment:

(A) Dismissing the complaint;

(B) Dismissing the complaint insofar as it purports to state a claim for relief against St. Joseph's Home of Peekskill

(C) For costs and disbursements;

(D) For such other relief as the Court may deem just and proper.

Dated New York, N.Y.
June 19, 1974

Bodell, Gross & Magovern

By Frederick J. Magovern

Attorneys for St. Joseph's Home of Peekskill
102 East 35th Street
New York, N.Y. 10016
212 686-1900

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK : COUNTY OF NEW YORK

---X

In the Matter of

DANIEL CRUZ b. 9/23/62

MARISOL LOPEZ 6/8/69

EDUARDO LOPEZ 9/21/71

Docket No. N704/06
1972

Children under Sixteen Years of Age Alleged to be Neglected.

---X

Lisa H. Elitman, MFY Legal Services, 214 East 3d Street, New York, New York 10009, Attorney for Respondent-mother.

Gerald E. Bodell, Esq., by Frederick J. Magren, Esq., 102 East 35th Street, New York, New York, Attorney for New York Foundling Hospital and St. Joseph's Home of Peekskill.

J. Lee Rankin, Corporation Counsel, by Stanley White, Esq., Assistant Corporation Counsel, 66 Leonard Street, New York, New York 10013, Attorney for Commissioner of Social Services.

CARTENSTEIN, J.:

The within proceedings, consolidated by order of this court entered on June 2, 1972 center around a writ of habeas corpus brought on by the mother of three children who are the subject thereof. The children now reside in foster care institutions and the mother seeks their return and custody. The writ, originally returnable in the Supreme Court, New York County, has been referred to this court by order dated and entered on March 6, 1972. The derivative power of this court based on this referral is co-extensive with that of the Supreme Court.

Subsequent thereto, a petition was filed in this court by the Bureau of Child Welfare of the New York City Department of Social Services (BCW) against the natural mother bringing on neglect proceedings under Article 10 of the Family Court Act. For the sake of clarity, the natural mother will be referred to as "petitioner" and the BCW and New York City Department of Social Services as "respondents." During the proceeding, when

it became apparent that the alleged illegal detention was in fact exercised by the St. Joseph's Home in Peekskill and the New York Foundling Hospital, both of which appeared generally, the court, on its own motion, added them as additional respondents on the writ.

BACKGROUND:

On or about December 23, 1969, petitioner was hospitalized at Bellevue Hospital for what was later diagnosed as suicidal ideation and characterized as schizophrenia. She was transferred to Central Islip Hospital and remained there for about three months. Prior to her hospitalization, she apparently turned her children over to a neighbor who then contacted BCW when the mother was not immediately discharged and it in turn placed the children in the respective institutions. Petitioner testified that some five days after her hospitalization a social worker visited her and she consented that these institutional respondents care for her children until she became well. Written consents appear in the records of the institutions received in evidence. When she was discharged from the hospital, she asked for the return of her children, apparently was refused, and took no action until the writ was brought on her behalf some two years later.

Petitioner now claims that the alleged detention was illegal when conceived and continues to be illegal until the present day.

It appears from the record that there are at least nineteen known instances of commitment of petitioner to mental hospitals between August 22, 1960 and June 26, 1972. Brief reference to her hospital charts which measure some four inches in thickness includes:

8/22/60 Suicide attempt; mental deficiency; emotionally unstable;

12/25/60 Suicide attempt; depressive reaction; acute brain syndrome associated with alcoholism;

10/13/62 Accute schizophrenic episode;

12/26/66 delusional and hallucinating;

12/30/67 unable to function outside hospital, yet discharged to family against medical advise;

1/22/68 readmission--paranoid delusional, schizophrenic;

12/26/69 suicidal ideation;

2/4/70 signed self out of hospital and refused to keep after-care appointments.

October and November 1970:
hospitalized and refused to go to Central Islip--signed self out;

3/22/72 Transferred to Manhattan State Hospital (during pendency of these court proceedings) from where she absconded on March 31, 1972 and remained unfound as of date set for hearing;

5/30/72 admitted to Bellevue;

6/26/72 admitted to Bellevue.

Despite the foregoing, petitioner's after-care psychiatrist testified on her behalf that she is capable of caring for her oldest child Daniel, age 10. He added that he does not yet recommend the return of the two younger children. Upon closer questionning by the court, this witness admitted that he was unfamiliar with his own patient's underlying diagnosis; that he had not examined the children nor was he in a position to testify as to the effect of any possible reunion on them; and that he continued to make this recommendation in the face of (A) the fact that a qualified psychiatrist who had treated petitioner and who was a member of the staff of the very same after-care clinic had emphatically recommended against return of the children to her; and (B) that despite his recommendation made in January, 1972, that petitioner was mentally able to care for Daniel, petitioner was nevertheless readmitted to Bellevue Hospital for psychotic episodes on two subsequent occasions.

The testimony of petitioner's expert witnesses staggers the imagination and is disbelieved as incredible.

It is impossible to summarize all the evidence before the court, but brief reference must be made to the testimony of the social worker at St. Joseph's that as recently as August 24, 1972, when petitioner visited Daniel, she watched T.V. while he played elsewhere. On September 23, 1972, petitioner paid attention to a male companion during visiting hours while very little attention was paid to Danny. Finally, it must be noted that on one occasion, when Danny was sent home for vacation on a trial discharge, upon his return, he asked not to be sent home again.

The court concludes from all the evidence before it that the best interests of the children do not dictate their return to their mother; that they are well and thriving in their present surroundings; that return to the mother would in fact present grave danger to their welfare.

THE DETENTION:

Obviously, the source of the detention, coming with petitioner's consent, was legal. Petitioner, as mother, had the right to place these children and respondents the right to receive them from her without any court authorization whatsoever. (Social Welfare Law Section 374 subd. 2). She confirms this legality and consent by her own testimony. Did this detention ever become illegal by lapse of time?

Petitioner cites Johnson v. Michael, 39 Misc. 2d 365 as supportive of the proposition that a legal removal can become illegal by a lapse of time and by failure to petition this court for relief legitimatizing any continued detention. This is clearly distinguishable by the fact that in Johnson, an emergency removal was made by a police officer against the will of the natural parent, and thus governed by very specific provisions of the predecessor to Article 10 of the Family Court Act, as opposed to the case at bar where the placement was, by petitioner's own testimony, voluntary.

action refers to declaratory

words of petitioner, "estop" the respondents from refusing to return the children because of "laches"? The answer must be in the negative. Obviously, the doctrines of laches and estoppel, must appropriate to the law of contracts, cannot act to prejudice the rights of children as wards of the court and diminish their absolute right to have this court act in their best interests. (See: People ex rel Chooklokian v. Mission of Immaculate Virgin, 192 Misc. 454 affd. 274 App. Div. 1049, mod., other grounds 300 N.Y. 43; cert. denied 339 U.S. 912).

Was there then, some procedure required of respondents at any time? While many possible avenues were open, no absolute requirement appears to have existed until the enactment of Section 392 of the Social Welfare Law effective subsequent to the commencement of these proceedings which mandates, on a voluntary placement by a parent, that an institution bring on proceedings for review before this court no less than once every 24 months or sooner if appropriate. The new statute insures that children and their parents will not be lost in red tape or bureaucracy which might thwart or diminish parental rights. It also acts as an impetus and/or stimulus to the agencies to see to it that their houses are in order and that proper steps are being taken to plan for children placed therein. This court has, in effect, been given the jurisdiction to police these placements where little existed before on a practical basis.

Clearly, therefore, the "detention" alleged was not illegal, nor in the absence of a statute comparable to Section 392, did it become illegal by the lapse of time.

While such is the determination of the court, it cannot pass on to other things without a clear statement that the law favors the unity of all families and obviously, there is no substitute for the care and understanding that only a parent can give. It is therefore the declared in-

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At a Term of the Family Court of the State of New York, City of New York, held in and for the County of N.Y.
at 135 E. 22nd St.,
on June 18, 1973

PRESENT:
HON. STANLEY GARTENSTEIN
Judge

Docket No. N-704-6/72

In the Matter of
Daniel Cruz, Manual Lopez and Eduardo Lopez.

A Child ~~xxx~~ under Sixteen (Eighteen) Years of Age
Alleged to be Neglected

ORDER OF DISPOSITION (Neglect)

The petition of Jeanett Robertson under Article 10 of the Family Court Act, sworn to on March 2, 1973, having been filed in this Court, alleging that the above-named child ~~xxx~~ under sixteen (eighteen) years of age ~~is~~ (are) a neglected child ~~xxx~~, and that Pauline Lopez (is) ~~(are)~~ the ~~(parent(s)) (person legally responsible for the care)~~ of said child ~~xxx~~; and

The matter having duly come on for an ~~adjudicatory~~ fact finding hearing and the Court having found that the said ~~[(parent(s)) (person legally responsible for the care)~~ of said child ~~xxx~~ (was) ~~(were)~~ present at the hearing and had been served with a copy of the petition] ~~[every reasonable effort had been made to effect service of the petition upon said (parent(s)) (person legally responsible for the care) of said child .....];~~ and

[Said child ~~xxx~~ having been represented by ~~(counsel)~~ (a law guardian) ~~(a guardian ad litem);~~] and

The Court, after hearing the proofs and testimony offered in relation to the matter, having found that the allegations of the petition were supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing and the Court, having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved, it is hereby

ADJUDGED, that the said Daniel Cruz, Manual Lopez and Eduardo Lopez

is ~~(are)~~ a neglected child ~~xxx~~ within the meaning of Article 10 of the Family Court Act; and it is therefore

~~[ORDERED, that judgment against .....~~

~~the (parent(s)) (person legally responsible for the care) of said child ..... be and the same hereby is suspended for a period of ..... months upon the terms and conditions specified in the appendix annexed to this order and made part hereof]~~

~~[ORDERED, that the custody of said child ..... be and the same hereby is discharged to the said (parent(s)) (person legally responsible for the care) of said child .....; and it is further~~

hear dispositional evidence until a finding was entered. However, the evidence in the primary stages of the writ, brought on by petitioner herself, being of a nature as addresses itself to the welfare of the children, is co-extensive with that evidence ordinarily submitted in the secondary stages of neglect proceedings in the dispositional phase. Thus, for all intents and purposes, a dispositional hearing has already been had. This is in accordance with the provisions of Sections 1047 and 1048 of the Family Court Act which requires no adjournment prior to dispositional hearing but which gives the court discretion to adjourn proceedings if it so desires, for investigation and report.

Nevertheless, though the court has jurisdiction to make a dispositional order for the reasons set forth, it will defer this prerogative in an effort to give petitioner every possible procedural benefit. Investigation and report is ordered. It shall be petitioner's burden at the dispositional hearing, to establish that the disposition shall be anything other than an order of placement to those facilities in which the children now find themselves. In the interim, the children are remanded to these facilities on a temporary basis. Recalendar dispositional hearing on first available date and notify all parties.

Retain exhibits pending appeal or expiration of time to appeal.

Dated: December 1, 1972.

J.F.C.

tention of the court in this case, that as soon as it is determined that petitioner is cured; that she presents no danger to herself or the children, that plans be made for the return of the children to her. As of this moment, regretfully, this does not appear to be within the realm of reasonable probability. However, in accordance with the spirit of Section 392, the respondents are directed to take such steps as will tend to rehabilitate this family unit and they are to use their good offices in connection with the planning for these infants, in obtaining deep, meaningful and effective treatment for petitioner's mental condition. If this planning fails, that will be the reality to be confronted later; but failure because of a lack of effort will not be tolerated.

DISPOSITION ON MOTIONS:

Petitioner's motions to hold respondents in default and to preclude are denied. Petitioner proceeded with the trial and thereby waived whatever objections she may have had. The intimate knowledge of counsel and exhaustive examinations conducted on petitioner's behalf belie the claims of surprise. The objection by petitioner to a consolidation is overruled in view of the fact that these proceedings had already been consolidated by order of June 2, 1972, time to appeal thereon having expired. Moreover, it should be unnecessary to point out that any default in pleading on the part of respondents if indeed it existed, could not affect the rights of the children to the protection this court is obliged to give them.

ORDER:

The writ is dismissed. The petition framed in neglect is sustained and a finding of neglect is made thereon.

Ordinarily, the proper order of proof in any situation involving incapacity of a parent to care for a child, would be the preliminary fact finding stage; then investigation and report under court auspices; a dispositional hearing on the adjourned date; and finally, an appropriate dispositional order (Family Court Act secs. 1047, 1048; In re Urdianyk, 27 A.D. 2d 122). The court would not have jurisdiction to

ORDERED, that the said (parent(s)) (person legally responsible for the care) of said child ..... be and the same hereby (is) (are) placed under the supervision of the Probation Department of the County of ..... for a period of ..... upon the terms and conditions specified in the appendix annexed to this order and made part hereof]

(ORDERED, that the said (parent(s)) (person legally responsible for the care) of the said child ..... and his) (her) spouse shall observe for a period of ..... the conditions of behavior specified in the appendix annexed to this order and made part hereof; and it is further

ORDERED, that, during the period of the aforesaid order of protection, the custody of the said child ..... be and the same hereby is awarded to .....); and it is further

(ORDERED that the said child ~~is~~ are be and the same hereby ~~(is)~~ (are) placed in the custody of ..... Commissioner of Social Services .... an authorized agency, for a period of eighteen months, (who shall provide for said child ..... as in the case of a destitute child or as otherwise authorized by law;)

(IT IS FURTHER ADJUDGED that the said child ..... (has) (have) been abandoned by the said (parent(s)) (person legally responsible for the care) of said child....., and it is therefore

ORDERED, that the said child ..... be and the same hereby (is) (are) discharged to the custody of ...., who shall provide such child ..... as in the case of a destitute child or as otherwise authorized by law.)

ENTER

J.F.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

PAULINE PEREZ, et al,
Plaintiffs

-v-

JULE M. SUGARMAN, et al,
Defendants
and
NEW YORK FOUNDLING HOSPITAL AND ST. JOSEPH'S HOME OF PEEKSKILL,
Defendants

----------x

72 Civil Action No. 3447 (CM)

ANSWER

ST. JOSEPH'S HOME OF PEEKSKILL BY ITS ATTORNEYS, BODELL, GROSS & MAGOVERN for its answer to the complaint herein:

1. Denies paragraph 1 and 2 except admits that plaintiff purport to base this action on the provisions and statutes cited in said paragraphs and that plaintiff seeks damages and declaratory relief.

2. Denies knowledge or information sufficient to form a belief as to all other allegations in the complaint except as hereinafter specifically set forth.

3. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 3 through 9 inclusive except

(a) admits that Pauline Perez is the biological mother of the infants Daniel Cruz and Marisol Lopez.

(b) admits that Daniel Cruz is under care of the St. Joseph's Home of Peekskill.

4. Denies paragraph 2, except admits that:

(a) St. Joseph's Home of Peekskill is located in Peekskill, New York.

(b) St. Joseph's Home is an "authorized agency" within the meaning of section 371 of the Social Services Law to provide treatment, services and care for children in need of care.

5. Denies paragraph 12 except admits Plaintiff Pauline Perez is the mother of three children, Daniel Cruz, Marisol Lopez, and Eduardo Lopez.

6. Denies paragraphs 13 through 23 inclusive except admits that:

(a) Plaintiff Pauline Perez has a long history of intermittent psychiatric hospitalizations at Bellevue Hospital as well as other hospitals.

(b) Plaintiff Pauline Perez was hospitalized at Bellevue Hospital on or about December 23, 1969 for what was later diagnosed as suicidal ideation and characterized as schizophrenia.

(c) Plaintiff Pauline Perez consented to the placement of her children with the defendants herein.

(d) a neglect proceeding was instituted in Family Court, New York County against plaintiff Pauline Perez and thereafter consolidated with a Writ of Habeas Corpus in Family Court.

(e) The Family Court on December 1, 1972 dismissed the Plaintiff Pauline Perez's Writ of Habeas Corpus and found Marisol Lopez, Edward Soto and Daniel Cruz to be neglected within the

meaning of Article 10 of the Family Court Act (copy of fact finding decision attached hereto as Exhibit A.

(f) The Family Court at a dispositional hearing pursuant to Section 10 of the Family Court Act on placed Marisol Lopez, Edward Soto and Daniel Cruz with the Commission of Social Services for eighteen months (copy of order attached hereto as Exhibit B.

7. Denies paragraph 24 through 39 inclusive.

FIRST AFFIRMATIVE DEFENSE

8. This Court lacks jurisdiction of this action.

SECOND AFFIRMATIVE DEFENSE

9. The Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

10. St. Joseph's Home of Peekskill has compiled with all the requirements of state and federal law.

FOURTH AFFIRMATIVE DEFENSE

11. The decision of the Honorable Stanley Gartenstein, Judge of the Family Court in the consolidated Habeas Corpus and neglect proceeding (Docket No. N 704-706/72 copy annexed as Exhibit A) is res judicata and bars the within action.

FIFTH AFFIRMATIVE DEFENSE

12. The rules of the Family Court adequately cover the question of due process of law. This action is not justiciable under 42 U.S.C. Section 1983, since it is not a proper civil

-31-

rights case, and neither can the claim of lack of due process be made in this Court, in view of the pendency of proceedings in the Family Court of New York County.

SIXTH AFFIRMATIVE DEFENSE

13. This Court should abstain from exercising jurisdiction over this action due to the continuing exercise of jurisdiction in the Family Court of the State of New York, New York County

Wherefore defendant, St. Joseph's Home of Peekskill, demands judgment:

(A) Dismissing the complaint;

(B) Dismissing the complaint insofar as it purports to state a claim for relief against St. Joseph's Home of Peekskill

(C) For costs and disbursements;

(D) For such other relief as the Court may deem just and proper.

Dated New York N.Y.
June 19, 1974

Bodell, Gross & Magovern

By_____
Attorneys for St. Joseph's
Home of Peekskill
102 East 35th Street
New York, N.Y. 10016
212 686-1900

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

PAULINA PEREZ, individually and on behalf of her infant children DANIEL CRUZ and MARISOL LOPEZ,

Plaintiffs,

-against-

72 Civ. 3447

JULE M. SUGARMAN, individually and as Commissioner of New York City's Human Resources Administration, et al.,

Defendants.

#42649

- x

METZNER, D. J.:

This is a motion to dismiss, or in the alternative, for summary judgment, pursuant to Fed. R. Civ. P., Rules 12(b) and 56. Movants herein are Jule M. Sugarman, individually and as Commissioner of the New York City Human Resources Administration, Elizabeth Beine, individually and as Director of Child Welfare Services, New York City Bureau of Child Welfare, and Seymour Fass, individually and as Director of the New York City Bureau of Child Welfare, Manhattan Section.

The detailed facts in this action, and the finding of a claim under the Fourteenth Amendment, are detailed in

this court's accompanying opinion on the motion by the foundling home defendants.

However, movants here contend only that the complaint does not state a claim as to them under Section 1983 because they are executive officials of the Human Resources Administration, and no specific acts are alleged in the complaint as to them.

The court is at a loss to understand this claim, as the complaint clearly states throughout that the defendants did the acts complained of. It is not necessary to state the name of each defendant in each allegation.

It is undoubtedly true that in a suit for damages under Section 1983 the general doctrine of respondeat superior does not apply, and there must be a showing of some personal responsibility. Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973). However, this is sufficiently alleged in the complaint. Thus the motion to dismiss must be denied.

As to the motion for summary judgment, the personal involvement of these defendants is the very fact at issue, and it is crucial to the suit. Although movants' attorney states that "the case of the Perez

children was one of hundreds pending in the office at the time," he nowhere avers, even on information and belief, that these movants did not directly participate in the acts alleged. No movant has filed an affidavit. Neither has the plaintiff. However, her counsel swears that the movants were personally involved. Clearly, then, there are substantial questions of fact as to personal involvement to be decided at trial.

The motion is in all respects denied.

So ordered.

Dated: New York, N. Y.
June 23, 1975

Charles M. McKay
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

PAULINA PEREZ, individually and on behalf of her infant children DANIEL CRUZ and MARISOL LOPEZ,

Plaintiffs,

-against-

72 Civ. 3447

JULE M. SUGARMAN, individually and as Commissioner of New York City's Human Resources Administration, et al.,

and

THE NEW YORK FOUNDLING HOSPITAL and ST. JOSEPH'S HOME OF PEEKSKILL,

Defendants.

- x

#12648

METZNER, D. J.:

This motion is brought by defendants The New York Foundling Hospital and St. Joseph's Home of Peekskill for summary judgment or, alternatively, to dismiss for failure to state a claim upon which relief may be granted. Fed. R. Civ. P., Rules 12(b)(6), 56.

Plaintiff Paulina Perez brought this action individually and on behalf of her infant children for damages under 42 U.S.C. § 1983. The paragraph of the

complaint setting forth the jurisdictional basis of the action refers to declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202. However, only money damages are sought on the five claims alleged in the body of the complaint.

It is claimed that these defendants, along with others, violated plaintiffs' rights under the Fourteenth Amendment in that Perez' children were taken from her without a hearing and detained by defendants against her will for a period exceeding two years.

On December 23, 1969, plaintiff Perez was taken ill and admitted to Bellevue Hospital. Her children, one seven years of age and the other six months, were taken into the custody of the New York Bureau of Child Welfare on plaintiff's oral consent and assigned to the defendants' child placement facilities. Perez was discharged from the hospital on February 11, 1970, and demanded that the defendants return her children, which demand was refused. Finally, on March 1, 1972, she instituted a habeas corpus proceeding in the New York Supreme Court. One day later, the Bureau of Child Welfare filed neglect proceedings against her in the Family Court, New York County. The habeas corpus proceeding was transferred

to the Family Court. On March 7, 1972, the Family Court ordered that custody be continued in the defendants' child placement facilities.

On August 14,1972, plaintiffs filed this action for relief based on violation of their constitutional rights.

Defendants first argue that summary judgment should be granted in their favor because the decision of the Family Court in the habeas corpus action, and its subsequent modification by the Appellate Division, First Department, of the New York Supreme Court, contains findings of fact determinative of the issue before this court, findings fully litigated among the same parties, and thus res judicata.

The appellate Division found that the original taking of the children did not comply with New York law, as written consent was required in lieu of a petition to the court. However, the Appellate Division stated that "[o]n the evidence before the Family Court, we conclude that the court properly dismissed the habeas corpus petition." In the Matter of Daniel C., et al., No. 1901, 1902 (App. Div., 1st Dept. March 6, 1975). It appears to this court

that the petition for habeas relief was dismissed because at the time the children were properly within the jurisdiction of the Family Court. However, that determination does not decide the issue before this court, namely; does the complaint state a claim for a violation of a federal constitutional right? Violation of a state law in itself does not give rise to an action under 42 U.S.C. § 1983. Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973).

It is a fair reading of Stanley v. Illinois, 405 U.S. 645 (1972), that there is a constitutional mandate under the Fourteenth Amendment that no child be taken from a biological parent, wed or unwed, without a hearing as to fitness of the parent.

In the instant case it is clearly alleged that, from the date of the original taking of the children through the date of the Family Court finding, there had been no such hearing. Therefore, a violation of a Fourteenth Amendment right has been properly claimed. As to the movants, their liability is predicated on allegations of knowledge of the original illegal action and participation in that action by the continued detention of the children.

Defendants contend that the oral consent found by the Family Court should amount to a waiver of any right to a hearing, and should bind this court as a matter of fact. Even were this court to assume itself bound by a finding of some oral consent and were to assume, arguendo, that such a consent constituted a waiver as to the initial removal of the children, the questions of scope of the waiver, the extent of permission granted and the like remain as questions of fact for trial, not to be determined on a motion to dismiss.

The existence of these factual questions also preclude the granting of summary judgment, as they are material questions going directly to the legality of the detention.

Motion to dismiss and for summary judgment denied.

So ordered.

Dated: New York, N. Y.
June 23, 1975

Charles H. Tenney
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAULINA PEREZ, individually and on behalf of her infant children DANIEL CRUZ and MARISOL LOPEZ,	:	
Plaintiffs,	:	
-against-	:	72 Civ. 3447
JULE M. SUGARMAN, individually and as Commissioner of New York City's Human Resources Administration, et al.,	:	Pretrial Order
and	:	(CMM)
THE NEW YORK FOUNDLING HOSPITAL and ST. JOSEPH'S HOME OF PEEKSKILL,	:	
Defendants.	:	

The parties have submitted briefs on the issues presented by this lawsuit.

The case involves a claim for money damages and attorneys' fees pursuant to 42 U.S.C. § 1983, for alleged violation of plaintiffs' constitutional rights by reason of defendants' taking the infant plaintiffs into custody without a hearing or consent of the plaintiff mother. It is also claimed that defendants detained the infant plaintiffs without a hearing after request by plaintiff mother for their return. Both compensatory and punitive damages are requested.

The dismissal of the third claim by this court has been affirmed by the Court of Appeals, 499 F.2d 761 (1974). Since plaintiffs make no mention in their

brief of the fifth claim requesting damages for false imprisonment, this claim is also dismissed.

Plaintiffs state that "the sole issue with respect to liability is whether defendants legitimatized their custody of Daniel Cruz and Marisol Lopez by obtaining either a court order or written consent."

The city defendants claim that they are not liable for any acts that were taken in this case. Defendants New York Foundling Hospital and St. Joseph's Home of Peekskill claim that the original custody was proper and, if not, they are not responsible for the actions taken.

The city defendants Beine and Fass move to dismiss the complaint against them for lack of personal service. This motion is denied. The motion for default was denied on November 18, 1975, on the express condition that they appear generally by the Corporation Counsel's office and the case proceed against them on the merits.

Each party shall serve on the other no later than December 29, 1975, the names of the witnesses each intends to call and a listing of the exhibits each intends to offer on the trial.

So ordered.

Dated: New York, N. Y.
December 18, 1975

CHARLES M. METZNER
U. S. D. J.

Perez v. Sugarman et al 72 Civ 3477

#44296

After reviewing the evidence in this case, I have come to the conclusion that the court must dismiss counts 1 and 2 of the complaint.

These counts are based on a claimed violation of plaintiffs' constitutional rights as provided by 42 U.S.C. § 1983. It is alleged that the failure of the defendants to afford Pauline Perez a hearing at or shortly after placing plaintiff's children in the custody of the New York Foundling Home and St. Joseph's Home respectively, violated the constitutional rights of both the mother and the children. For the purposes of this memorandum, I will assume, based on the evidence offered by the plaintiffs, that the right to such a hearing could have been satisfied by a court order obtained by the defendants or the consent of the mother.

Admittedly, a court order was never obtained by either agency. I will assume for these purposes that Pauline Perez did not give her consent to custody of the children to the defendants through the Bureau of Child Welfare of the City of New York.

The initial custody in December 1969 was clearly proper since the facts show an emergency situation with the mother in the psychiatric ward of Bellevue Hospital and no one to take care of the children. The record will show that plaintiffs have conceded that there is no issue as to this. The issue is whether the defendants are liable for having continued custody to March 7, 1972, despite the pleas of the mother for the return of her children.

In this case, the initial finding necessary to be made is whether the children are destitute, neglected or abandoned. It seems clear to the court that the children should be designated as destitute (Social Service Law § 371(3)), since abandonment and neglect imply improper acts on the part of the parent. The custody was not permanent and the mother had the right to regain custody when she was able to properly provide for the children. This would be true even if a written consent had been executed by the mother. § 383.

Boone v. Wyman, 295 F. Supp. 1143 (S.D.N.Y.), aff'd per curiam, 412 F.2d 857 (2d Cir. 1969), cert. denied, 396 U.S. 1024 (1970), sets forth the law in

this circuit at least up to the decision on April 3, 1972 in Stanley v. Illinois, 405 U.S. 645. Boone held that procedural due process was not denied by the failure of the agency to hold a hearing or institute judicial proceedings upon receipt of a request for the return of the child. Judicial proceedings to regain custody were found available to the mother and thus the failure on the part of the defendants to take action did not amount to the deprivation of a constitutional right.

Thus, we never reach the rule enunciated in Wood v. Strickland, 420 U.S. 308 (1975), which is bottomed on the premise that the action is not justifiable when it is based on "ignorance or disregard of settled, indisputable law." And we never reach the question of whether the defendants here are entitled to the qualified immunity referred to in Wood v. Strickland.

The first and second claims are therefore dismissed.

So ordered

April 26, 1976 Charles H. Tuttle

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JOSEPHINE DUCHESNE, Administratrix of PAULINA PEREZ, et al.,

Plaintiffs,

-against-

JULE M. SUGARMAN, et al.,

Defendants.

72 Civ. 3447 (CMM)

- x

METZNER, D. J.:

There has been submitted to the court a statement of the evidence pursuant to Rule 10(c) of the Rules of Appellate Procedure. Objections to the statement have been filed by opposing counsel.

I agree with the objections filed by the Corporation Counsel as to both his suggested additions to the testimony of Dr. Smith, and the suggested deletions in the deposition of Paulina Perez. I would also add to Dr. Smith's testimony that Paulina Perez had four children, each fathered by four different men, without marriage to any of them.

The docket sheet shows an entry for my opinion issued at the end of the entire case dismissing counts 1 and 2 of the complaint. Consequently, this will be part of the record on appeal.

I agree with the objections filed by counsel for the New York Foundling Hospital and St. Joseph's Home of Peekskill as to Nos. 1 through 12. No. 8 is specifically covered by the above referenced opinion.

As to the objections to the specific testimony, I will dispose of them as follows:

No. 13 is denied. No.14 is denied.

No. 15 I assume refers to No. 6 and is granted.

No. 16 which refers to No. 7 is granted.

No. 17 is denied. No. 18 is denied.

No. 19 is granted. I assume this refers to No. 8, not No. 7.

No. 20 is denied.

No. 21 is denied. This refers to No. 7 in which Mrs. Duchesne said she took care of her own children, but their ages are 20, 28 and 29, and this fact should be inserted.

No. 22 is denied. No. 23 is denied.

No. 24 is denied. No. 25 is denied.

No. 26 is denied. No. 27 is denied.

No. 28 is granted as to items 10 and 11.

No. 29 is denied. No. 30 is denied.

No. 31 is granted. No. 32 is denied.

No. 33 is granted.

The court has in its possession a portion of the charge which is not boiler-plate and attaches it to this

memorandum for use on the appeal.

So ordered.

Dated: New York, N. Y.
January 24, 1977

Charles M. Metzner
U. S. D. J.

Form 26-D.M.H.

204-4

(18A)

ALAN D. MILLER, M.D.
COMMISSIONER

A. ANTHONY ARCE, M.D.
DIRECTOR, BUREAU OF
AFTERCARE SERVICES

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE

AFTERCARE CLINIC

39 EAST 17TH STREET
NEW YORK, N. Y. 10003
TELEPHONE: GRAMERCY 3-0500

PRIVILEGED AND CONFIDENTIAL
FOR PROFESSIONAL USE ONLY

April 29, 1970

Bureau of Child Welfare
80 Lafayette Street
New York, N.Y.10013

Re: Pauline Perez
BCW#2978607
BCW Caseload 204

Attention: Mr. James R. Princeler
Supervisor I

Dear Mr. Princeler:

This is in reply to your letter of April 1, 1970 requesting information on the above-named. We can give you the following:

Miss Perez was born June 22, 1942 in Puerto Rico. She went to the 6th grade in New York. She claimed to have been at Central Islip State Hospital in 1962, but there is no record of previous admission. She was admitted January 30, 1968 to Pilgrim State Hospital because of paranoid delusions and auditory hallucinations. Her diagnosis is Schizophrenia, Paranoid Type. She improved and was discharged March 16, 1968. Her second admission was on a voluntary application on January 19, 1970 to Central Islip State Hospital because of recurrence of symptoms. She improved again and was discharged on February 11, 1970.

Since her release from the hospital, patient has made a good adjustment. She has been attending the Aftercare Clinic regularly once a month as scheduled, and she is taking a mild tranquilizer. On January 24, 1970 an AZ Test at the hospital was positive but patient says that she had had her period since and that she is not pregnant.

Presently patient is in good contact and does not exhibit any psychopathology. Prognosis is guarded. It is, however, my considered opinion that patient may be trusted with the care of her children, preferably first with the older child, and after some time of satisfactory adjustment, with the baby. I feel that she will be able to function in her role as a mother.

I trust that this information will assist you in planning for Miss Perez' children.

Sincerely yours,

Leonard Kane M.D.

Leonard Kane, M.D.
Assistant Director

ES:TM

many which develop under the Internal Revenue Code) will be considered open with respect to the affairs of all taxpayers, including those residing in Circuits which have already passed upon the question. The Government will be encouraged to use the possibility of such overruling of decisions in this Circuit, as it has in this instance, as a means to discourage the Supreme Court from resolving such conflicts among Circuits. Additionally, the possible availability to the Government of such overruling decisions in the Circuits (as a practical matter not available to private parties) will serve as an inducement or invitation to the Government to refrain from seeking resolution of these questions by Congress.

The Government's approach to the precedential force of decisions in tax cases is strange, indeed. It has now been successful in its effort to have this court effectively hold that once a division of opinion arises between and among Circuits the rule announced in those Circuits rejecting the Government's position should be open to attack in connection with each case that may subsequently arise in such Circuits.

This procedure favored and adopted by the Government opens up only a one-way street. Few, if any, taxpayers who are confronted with a pre-existing decision in their particular Circuit which supports the Government, will be intrepid enough or financially strong enough to carry a case seeking an overruling decision through the Tax Court, through a regular panel, and through the Court of Appeals in banc. In the instant case the Government could have sought initially a hearing of the appeal in banc, but it elected not to do so. Thus, the taxpayer has been subjected to a three-level proceeding with all the attendant delays, burdens, costs and expenses. I venture to say that the costs and expenses are times greater than the amount of tax liability in controversy.

Counsel for the Government has opposed the proposal that, if this court were to overrule *Pridemark*, its judgment should be prospective only, apparently considering that the additional tax and the costs and expenses of the litigation here and in the Tax Court appropriately penalize the taxpayer for its intransigence in *relying* upon an unreversed decision of this court which established the law of this Circuit.

It is my individual opinion that changing the established rules in the middle of the game is unjust, unfair, and inconsistent with the operation of a viable system of legal precedents, particularly to a taxpayer such as this one with a relatively small amount at stake. The controlling law of this Circuit, as it existed at the time of taxpayer's transaction, should be applied and taxpayer should have the right to any tax benefit available to it under *Pridemark*. It is unconscionable to hold otherwise. In all fairness and justice I cannot be persuaded to join in placing the taxpayer in such an unfavorable and unreasonable position by a denial of prospective application of our decision which definitely changes the rules of the game.

Paulina PEREZ et al., Plaintiffs-Appellants,

v.

Julie M. SUGARMAN et al., Defendants,

and

New York Foundling Hospital and St. Joseph's Home of Peekskill, Defendants-Appellees.

No. 202, Docket 73-1790.

United States Court of Appeals, Second Circuit.

Argued Dec. 3, 1974.

Decided June 7, 1974.

Civil rights suit was brought against four individual municipal employees and two private child-caring in-

stitutions by mother who alleged that her children had been removed by the city and detained by the institutions for over two years without her consent and without benefit of either a court order protecting the detention or a hearing of any kind whatsoever. The United States District Court for the Southern District of New York, Charles M. Metzner, J., dismissed the complaint against the institutions on the ground that the Court did not have subject matter jurisdiction over them, and an appeal was taken. The Court of Appeals, Waterman, Circuit Judge, held that the District Court did have subject matter jurisdiction, since the actions of the institutional defendants constituted "state action" both under a "public function" theory and also in view of the persuasive evidence of the degree to which the state has insinuated itself into the actions of the institutional defendants.

Reversed and remanded.

1. Courts ⇐284(4)

District court had subject matter jurisdiction of civil rights suit brought against, inter alia, two private child-caring institutions by mother who alleged that her children had been removed by the city and detained by the institutions for over two years without her consent and without benefit of either a court order protecting the detention or a hearing of any kind whatsoever, since the actions of the institutional defendants constituted "state action" both under a "public function" theory and also in view of the persuasive evidence of the degree to which the state has insinuated itself into the actions of the institutional defendants. Social Services Law N. Y. §§ 371, subd. 10, 372, 395, 398, subd. 6(g, h), 400; 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.5(2)

Civil rights statute's "under color of" law provision is congruent to the "state action" concept. 42 U.S.C.A. § 1983.

3. Constitutional Law ⇐254

As a general rule, the proscriptions of the Fourteenth Amendment do not extend to private conduct, but conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. U.S.C.A.Const. Amend. 14.

4. Civil Rights ⇐13.5(2)

In certain instances, the actions of private entities may, within meaning of civil rights statute, be considered to be infused with "state action," if those private parties are performing a function which is public or governmental in nature and which would have to be performed by the government but for the activities of the private parties. 42 U.S.C.A. § 1983.

5. Civil Rights ⇐13.5(2)

In accepting and retaining custody of children alleged to have been "neglected" or "abandoned," private child-caring institutions perform a "public function" and there is thus "state action" within meaning of civil rights act. Social Services Law N.Y. § 395; 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

Lisa H. Blitman, George C. Stewart, Napoleon B. Williams, New York City, for plaintiffs-appellants.

Frederick J. Magovern, Bodell, Gross & Magovern, New York City, for defendants-appellees.

Before WATERMAN and FEINBERG, Circuit Judges, and GURFEIN, District Judge.*

WATERMAN, Circuit Judge:

[1] This is a civil rights suit brought under 42 U.S.C. § 1983 against four individual defendants, all of whom

* Of the Southern District of New York, sitting by designation.

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are employed by the municipality of New York City, and two private child-caring institutions, New York Foundling Hospital and St. Joseph's Home for Children. The complaint alleges deprivations of the constitutional rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment. In the district court below the two institutional defendants moved to dismiss the complaint as against them on the grounds, inter alia, that the court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. The district court, Metzner, J., apparently assuming arguendo that subject matter jurisdiction existed, first dismissed the complaint, but only to the extent that it was based on alleged denials of equal protection, against the institutional defendants upon the ground that it failed to state a claim upon which relief could be granted. Judge Metzner then dismissed the entire complaint against the private institutions for lack of subject matter jurisdiction. We do not disturb the district court's dismissal of the complaint insofar as the complaint alleges equal protection violations.[1] We hold, however, that the district court had subject matter jurisdiction and, accordingly, we reverse the district court's dismissal for lack of subject matter jurisdiction and order the complaint reinstated against the defendants-appellees herein except to the extent that it rests on alleged denials of equal protection.

The gravamen of the complaint is an alleged unlawful and unconstitutional detention of appellant[2] Perez's children. Although the allegations are unclear at some points in describing what specific acts were performed by which particular defendants, the complaint does disclose the general sequence of events concerning which the plaintiff complains. In late December 1969, plaintiff-appellant suddenly became ill and was transported to a hospital by ambulance. During the period of her hospitalization appellant's children came into the custody of New York City child welfare officials. The children were subsequently placed by the city with the two private institutional defendants herein. Following her release from the hospital appellant began to request the return of her children, but the defendants refused to surrender custody.

The complaint states that it was not until March of 1972 that the defendant city officials made any attempt to obtain a court order to attest to the validity of their detention of appellant's children. Even then, the neglect proceeding filed by the city in the Family Court was apparently instituted only in response to a petition filed by appellant in New York Supreme Court for a writ of habeas corpus, in which she sought return of her children. In short, appellant's complaint alleges that these children were removed by the city and then detained by the defendant institutions for well over two years without the parent's consent or without benefit of either a court order protecting the detention or benefit of a hearing of any kind whatsoever. The complaint also alleges that the institutional defendants were cognizant of the fact that there had been no hearing and that there had been neither a court order authorizing institutional custody nor consent of the parent agreeing to it.[3]

1. As to this point, we adopt the reasoning of the court below.

2. Technically, appellant Perez's infant children are also parties to this action. For the sake of simplicity, we shall dispense with referring to the children as "appellants."

3. Assuming the court to have subject-matter jurisdiction over the claims alleged against the institutions appellant and appellees have devoted some attention to the question of whether the complaint states a cause of action upon which relief can be granted to appellant. As we have indicated, a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, in addition to the motion under Rule 12(b)(1), was before Judge Metzner. Except to the extent of dismissing the equal protection portion of the claim, however, the district court did not decide the 12(b)(6) motion. We therefore are not required in advance of a ruling below to deter-

[2] 42 U.S.C. § 1983, the provision of law upon which this lawsuit is predicated, is apposite only when the person against whom the provision is invoked has acted "under color of" law. It is well-established that this jurisdictional prerequisite is congruent to the "state action" concept. United States v. Price, 383 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966); United States v. Wiseman, 445 F.2d 792, 794 (2 Cir.), cert. denied, 404 U.S. 967, 92 S.Ct. 346, 30 L.Ed.2d 287 (1971).[4] In this case the appellee institutions, concededly private in nature, contend that their actions in detaining the appellant's children do not constitute "state action" but rather the action of private parties wholly without the purview of Section 1983. For the reasons developed below, we disagree, and we conclude that under the circumstances here the actions of the institutional defendants did constitute "state action" and therefore the district court had subject matter jurisdiction.

[3] As a general rule, the proscriptions of the Fourteenth Amendment do not extend to private conduct. But "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966). While the numerous cases which have grappled with the concept of "state action" have reached widely disparate results, this apparent disarray is to be expected since "[o]nly by sifting facts and weighing circumstances [of each case] can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961); accord, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); Evans v. Newton, 382 U.S. 296, 299–300, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); Male v. Crossroads Associates, 469 F.2d 616, 620 (2 Cir. 1972). When we "sift the facts" and "weigh the circumstances" before us here, we conclude that the acts of the private institutions of which appellant complains were "under color of" state law.

mine whether the due process portions of the complaint state a cause of action upon which relief can be granted. However, we observe in this connection that the allegations of the complaint are far from frivolous.

These children were placed in defendant institutions in December of 1969. At that time § 398, subd. 2(b) of the New York Social Services Law, McKinney's Consol.Laws, c. 55 declared that the power and the duty of a social welfare officer was to "[r]eceive and care for any child alleged to be neglected or abandoned who is temporarily placed in his care by the family court pending adjudication by such court of the alleged neglect or abandonment. . . ." This provision seems to imply that there was no authority at that time to receive and care for appellant's children without an order, or at least a pending proceeding to obtain an order, of the family court.

On June 1, 1970, when the appellant's children were still in the custody of the institutions, amendments to § 398 became effective. The law then read and now provides that "[a] social services official shall have the same authority as a peace officer to remove a child from his home without an order of the family court and without the consent of the parent . . . if . . . continuing in the home presents an imminent danger to the child's life or health. When a child is removed from his home pursuant to the provisions of this subdivision, the social services official shall *promptly* inform the parent . . . and the family court of his action." (Emphasis supplied). NYSSL § 398, subd. 9. Although this amended section might authorize *removal* from the home without a court order, it would not seem to justify a detention in excess of two years without a court order or a hearing. Moreover, as we have stated, the initial removal in this case would appear to have been governed by the provisions of § 398 existing on the date of that removal. Thus, it is possible that both the initial removal and the subsequent detention involve violations of law.

4. "'Under color' of law means the same thing in [18 U.S.C.] § 242 that it does in the civil counterpart of § 242, 42 U.S.C. § 1983." United States v. Price, *supra*, 383 U.S. at 794 n. 7, 86 S.Ct. at 1157.

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[4, 5] In certain instances the actions of private entities may be considered to be infused with "state action" if those private parties are performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties. See Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); United States v. Wiseman, *supra*. For example, in United States v. Wiseman, *supra*, we held that the acts of private process servers there constituted "state action" despite the fact that the servers were not technically state employees. The rationale of that decision was that the function which these people performed was one "essentially and traditionally" public. Similarly, in Evans v. Newton, *supra*, the operation of a municipal park was considered essentially public in nature, irrespective of whether the parties supervising the operations of the park were private persons or public officials. In accepting and retaining custody of children alleged to have been "neglected" or "abandoned," child-caring institutions of the type we have in this case perform a "public function." Any doubt that this function is a public one is dispelled by even a cursory reading of Section 395 of the New York Social Services Law (McKinney Supp.1972) (NYSSL), which declares that government officials "shall be responsible for the welfare of children who are in need of public assistance and care, support and protection . . . ." In fulfilling this responsibility, however, the State may provide direct assistance or, should it so choose, the State may act "*through* an authorized agency." Id. Both institutional defendants herein lie within the statutory definition of "authorized agency." See NYSSL § 371(10). Thus, the statutory scheme expressly contemplates that in performing this public function of caring for children the State may utilize private entities of the sort we have here.[5] This is precisely what the city welfare officials did when they transferred appellant's children to the care of the institutional defendants. But, as the statute makes incontrovertibly clear, it is the State which in effect is providing the care *through* the private institutions. This exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the children, and, consequently, the public nature of the function being performed.

We need not rely solely on the "public function" theory, however, to support our conclusion that "state action" exists. The comprehensive statutory regulatory scheme of the New York Social Services Law is persuasive, perhaps compelling, evidence of the degree to which the State has insinuated itself into the actions of the private defendants here. As we have already indicated, the statute makes the State bear responsibility for the care of all children in need of assistance. NYSSL § 395. The pervasiveness of the state control over cooperat-

5. In a footnote in their brief in this court, appellees direct our attention to the point in appellant's complaint where the appellees are described as "agents" of New York City. From this characterization appellees reach the novel conclusion that they must be considered as organs of a municipality. We are then referred to cases which have held municipalities immune from suit under 42 U.S.C. § 1983. We find this line of reasoning superficial. Acceptance of such reasoning would foreclose suit against any party who could be regarded as an agent of a municipality. Yet, § 1983 cases invariably concern individuals or institutions who are alleged to have acted in just such an agency capacity for the State. Appellees next suggest that the appellee institutions may not be "persons" within the § 1983 definition of that term. But this contention must also be rejected, for § 1983 *has* served as a vehicle for bringing suit against corporate entities. See, e. g., Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 152 (6 Cir. 1973); Bronson v. Consolidated Edison Co., 350 F.Supp. 443 (SDNY 1972); Stanford v. Gas Service Co., 346 F.Supp. 717 (D.Kan.1972).

ing private institutions is disclosed by further inquiry. Section 371(10) requires that any child-caring institution desiring to qualify as an "authorized agency" must be incorporated in New York and must consent to be approved, visited, inspected, and supervised by the State "as to any and all acts in relation to the welfare of [the] children" it receives from the State. Public Welfare officials have the power to place children only in those institutions which are "visited, inspected and supervised by the board and conducted in conformity with the rules of such board." Id. § 398, subd. 6(g). The State may visit any such institution, id. § 386, and the law recommends that this be done at least four times a year. Such institutions must keep detailed records which can be inspected by the State and must make reports to the State on special forms supplied by the State. Id. § 372. Additionally, the State must supervise children of whom it has taken custody until they reach the age of twenty-one. Id. § 398, subd. 6(h). Most importantly, the absolute dominion of the State over the private institutions is illustrated by the State's ability to remove the children from the institution at any time. Id. § 400. This comprehensive statute thus establishes that while the State may have yielded physical possession of the children, at no time did it, or indeed could it, relinquish effective legal control over them. This retention of control does not, however, undercut the importance of the institutions in the overall scheme to care for needy children. As noted, the New York Social Services Law expressly contemplates the use of private facilities to accomplish the public purpose here. Indeed, these private entities are an integral part of the public operation of providing assistance. And, as the Supreme Court has pointed out in Burton v. Wilmington Parking Authority, *supra*, the dependence of the State on private parties is a factor which tends to establish the intimacy requisite to a finding of "state action."

We point out that appellant does not claim that the regulatory system to which these private institutions are subjected when they accept children from the State compels a holding that *every* action in which such an institution engages is "state action." Rather, appellant argues only that the particular custodial power exercised here in detaining appellant's children constitutes "state action" because there is a nexus between the public function being performed and the specific acts which are alleged to be objectionable. Just as in United States v. Wiseman, *supra*, 445 F.2d at 796, "this case directly involves defendants' mode of conducting the public function and does not involve a collateral aspect of" the business of operating an institution which cares for children. The existence of this nexus has made the courts more receptive to a finding of "state action." See, e. g., id. at 796.[6]

Appellant maintains that the district court prejudicially erred in failing to grant her request that the defendant institutions be directed to answer interrogatories which sought to obtain information about any public funding the institutions receive. Appellant desired this information for the purpose of proving her allegations of "state action," and, in view of the holding we reach here, it is obviously no longer necessary for us to consider this issue.

Reversed and remanded.

6. In situations where this connection was absent, however, a much more substantial showing of state implication into the private action has been required. See, e. g., Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2 Cir. 1971).

Appellees place particular emphasis on this case. As mentioned, the lack of a nexus is significant, and therefore the holding in *Lefcourt* is inapplicable to the case before us. Furthermore, *Lefcourt* is distinguishable because it involved a function which "far from being the function of an agency which 'traditionally serves the community' is normally performed for and by private persons." Id. at 1156. Also, the city there retained "few controls" over the private party alleged to have engaged in "state action."

In the Matter of DANIEL C. and Other Children Under 16 Years of Age, Alleged to be Neglected. THE PEOPLE OF THE STATE OF NEW YORK ex rel. PAULINE P., on Behalf of DANIEL C. and Another, Appellant, *v.* BUREAU OF CHILD WELFARE et al., Respondents.

First Department, March 18, 1975.

Parent and child — neglect proceeding — since petitioner was not afforded reasonable opportunity to present her evidence to rebut charge of neglect, finding of neglect which was made against petitioner, after she had rested

her case in habeas corpus proceeding for return of her children without having offered any defense to charge of neglect, is stricken, and matter is remanded to Family Court for hearing on issue of neglect — fact that petitioner had been confined to hospitals at intervals did not establish neglect or unfitness per se — habeas corpus proceeding was properly dismissed — dispositional order directing that petitioner's children be placed with Commissioner of Social Services should be reversed.

1. In December, 1969, petitioner, who has previously required psychiatric treatment and short-term hospitalization, orally consented to placement of her three children, after becoming ill and signing herself into a hospital. When respondents refused to surrender custody of the children upon her release from the hospital, petitioner commenced a proceeding for a writ of habeas corpus for the return of her children, which was transferred to the Family Court and consolidated with a neglect proceeding which had been filed by respondents. After petitioner rested her case on the habeas corpus proceeding without having offered any defense to the charge of neglect, and before respondents offered their rebuttal evidence, the court agreed, over petitioner's objection, to consider all evidence put in as evidence in both the writ and neglect proceeding. Subsequently the writ was denied and a finding of neglect was made against petitioner. Although the removal and detention of petitioner's children was violative of former article 3 of the Family Court Act (now covered by article 10) since there was no court order obtained and petitioner did not consent to the removal, nevertheless, the habeas corpus proceeding was properly dismissed based on the evidence before the Family Court.

2. However, since petitioner was not afforded a reasonable opportunity to present her evidence to rebut the charge of neglect and to negative any evidence of a substantial probability of neglect or future harm to the children, the finding of neglect is stricken, and the matter is remanded to Family Court for a hearing on the issue of neglect. A finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone. There was no evidence of maltreatment of the children by petitioner or that in the past they suffered harm at her hands. The fact that petitioner had been confined to hospitals at intervals did not establish neglect or unfitness per se. It is for the court to determine if, at the time of hearing, the children are suffering or are likely to suffer from neglect.

3. The dispositional order which directed that petitioner's three children be placed with the Commissioner of Social Services for a period of 18 months should be reversed on the law since the validity of such order rested on the initial determination of neglect.

APPEAL (1) from an order of the Family Court, New York County (STANLEY GARTENSTEIN, J.) entered December 1, 1972, which dismissed petitioner's habeas corpus proceeding and found that petitioner had neglected her children, and (2) from an order of said court, entered June 18, 1973, which directed that petitioner's three children be placed with the Commissioner of Social Services for a period of 18 months.

Lisa H. Blitman of counsel (*MFY Legal Services, Inc.*), for appellant.

Murray L. Lewis of counsel (*L. Kevin Sheridan* with him on the brief; *Adrian P. Burke, Corporation Counsel*), for Bureau of Child Welfare and others, respondents.

Frederick J. Magovern of counsel (*Bodell & Magovern, P. C.*, attorneys), for New York Foundling Hospital and another, respondents.

STEVENS, J. P. Petitioner appeals from an order of the Family Court, entered in New York County on December 1, 1972, (GARTENSTEIN, J.) which dismissed her habeas corpus proceeding and also made a finding that petitioner had neglected her children. She also appeals from a dispositional order entered June 18, 1973, in the same court by the same Judge, which directed that her three children be placed with the Commissioner of Social Services for a period of 18 months.

The record indicates that petitioner, the mother of three children, from time to time has required psychiatric treatment and short-term hospitalization. On one such occasion in December, 1969, she became ill and signed herself into Bellevue Hospital where she remained for six days. At that time she orally consented to placement of her children. After her release on February 11, 1970, she sought the return of her children. When the respondents refused to surrender custody, she instituted a proceeding for a writ of habeas corpus in Supreme Court, New York County, for the return of her children. Thereupon, a neglect petition was filed in Family Court against petitioner and the habeas corpus proceeding was transferred to the Family Court, where it was consolidated with the neglect proceeding for trial.

Petitioner asserts that she was assured the hearing would proceed first on the habeas corpus proceeding after which the evidence on the neglect proceeding would be heard. In support of the writ, petitioner offered the testimony of two psychiatrists and a social worker as to petitioner's condition, her capabilities and her affection for the children. The respondents offered in opposition the testimony of a psychiatrist and the supervisor of social services at the St. Joseph's Home where Daniel, one of petitioner's children, had been placed. The testimony and the opinions expressed differed as to the advisability of returning the children to petitioner. The court made a thorough, painstaking inquiry including an interview with Daniel, who expressed a desire to return to live with his mother. The court also considered various hospital and clinical records with respect to petitioner.

After petitioner rested her case on the habeas corpus proceeding, counsel for some of the respondents made a motion that the court consider all evidence put in as evidence on both the writ and the neglect proceeding. Over petitioner's objection, the motion was granted. Subsequently, the writ was denied and a finding of neglect was made against the petitioner.

On this appeal, petitioner urges that the removal and detention of her children was without a court order or her written consent and therefore was violative of the Family Court Act and the Social Services Law. Since the children were removed from petitioner in 1969, former article 3 of the Family Court Act, now covered by article 10 of such act (see especially § 1021 *et seq.*) as well as the relevant portions of sections 383, 384 and 398 of the Social Services Law would apply, and petitioner's contention is correct since initially there was no court order obtained and neither did she give her written consent to the removal and detention of her children, nor was a petition timely made to the court as required.

Petitioner complains also that she was not afforded an opportunity to present a defense to the charge of neglect and that the court failed to conduct a fact-finding hearing on that issue. Petitioner alleges that she did not attempt to put in any defense while presenting her case on the writ because of the statement by the court that it would hold "in abeyance the neglect proceeding until we see what disposition we make so far as the infant is concerned and that will be on the writ of habeas corpus." Petitioner states that after she rested her case and all her witnesses had left the court, respondents, in rebuttal, introduced in evidence the various hospital records. She states further that Jeanette Robertson, the petitioner in the neglect proceeding, did not appear or testify, but the sole consideration on the issue of neglect was the evidence received at the hearing on the writ. This, petitioner asserts, was insufficient to sustain a finding of neglect.

Subdivision (b) of former section 312 of the Family Court Act described a neglected child as one "who suffers or is likely to suffer serious harm from the improper guardianship, including lack of moral supervision or guidance, of his parents or other person legally responsible for his care and requires the aid of the courts".

That section was repealed (L. 1970, ch. 962, § 8, eff May 1, 1970) and the subject is now covered by article 10 of the Family Court Act. Under subdivision (f) of section 1012, "'Neglected child' means a child less than eighteen years of age (i) whose

physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education * * * though financially able to do so or * * * (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court." Section 1046 (subd. [a], par. [viii]) of the Family Court Act states how proof of neglect or abuse of a child shall be established. "Proof of the 'impairment of emotional health' or 'impairment of mental or emotional condition' as a result of the *unwillingness* or inability of the respondent to exercise a minimum degree of care toward a child may include competent opinion or expert testimony and may include proof that such impairment lessened during a period when the child was in the care, custody or supervision of a person or agency other than the respondent." (Emphasis supplied.) The quoted paragraph is apparently that which, to some extent at least, was relied upon by respondents. In a fact-finding hearing a determination that a child is neglected must be based on a preponderance of the evidence (Family Ct. Act, § 1046, subd. [b]) and except as otherwise provided by article 10, only competent, material and relevant evidence may be admitted (Family Ct. Act, § 1046, subd. [b], par. [ii]).

Respondents contend there was a hearing and sufficient evidence to support a finding of neglect. In brief, respondents say the same evidence concerning petitioner's hospitalization and her mental condition is adequate to support both the denial of the writ and the finding that the children were neglected.

A finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone. It is for the court to determine if at the time of hearing the children are suffering or likely to suffer from neglect (*Matter of Vulon*, 56 Misc 2d 19). A reasonable opportunity for refutation of the charges upon which the neglect determination is based should be afforded respondent. (See *Matter of Kenya G.*, 74 Misc 2d 606.) There was no evidence of maltreatment of the children by petitioner or that in the past they suffered harm at her hands. Whenever she felt a possible recurrence of her disability, petitioner would volun-

tarily sign herself into a hospital facility for treatment, apparently after first arranging for the care of the children.

For approximately two years or more prior to the finding of neglect, petitioner had neither care, custody nor control of the children. The finding of neglect had to rest solely upon the existence of her mental condition. Even during the period that petitioner was refused custody there was some demonstration by her of parental concern and affection for the children. The fact that she had been confined to hospitals at intervals did not establish neglect or unfitness per se (*Matter of Karr*, 66 Misc 2d 912). While it is recognized that the hearing was somewhat lengthy and that the court evinced genuine concern, petitioner should have been afforded an opportunity to present her evidence to rebut the charge and to negative, if she could, any evidence of a substantial probability of neglect or future harm to the children.

On the evidence before the Family Court, we conclude that the court properly dismissed the habeas corpus petition.

Accordingly, the order of December 1, 1972, as appealed from should be modified on the law to strike the finding of neglect and to remand the matter to Family Court for a hearing on that issue and, as so modified the order is otherwise affirmed without costs.

As to the dispositional order of June 18, 1973, since the validity of such order rested upon the correctness of the initial determination of neglect, such order should be reversed on the law, without costs.

KUPFERMAN, J. (concurring in part). As the majority recognizes: "The finding of neglect had to rest solely upon the existence of her mental condition". This was amply demonstrated and the conclusion logically drawn by a concerned Judge after careful consideration. There is nothing invidious in this obvious finding, which was in the best interest of the children.

We concur in that part of the result which remands the matter to the Family Court, however, on the basis that the 18-month period of placement with the Commissioner of Social Services provided for in the dispositional order, has expired, and the mother certainly deserves a new hearing as to her current ability, within the purview of article 10 of the Family Court Act, to care for the children.

It should also be noted that this matter has been too much litigated (see *Perez* v. *Sugarman*, 499 F. 2d 761 [C. A. 2d, 1974]), and a dispositional hearing as to the past will accomplish naught

in this tragic family situation. If the mother is now mentally stable or can arrange for other care, such as by competent relatives, then there should be no problem.

MURPHY, LANE and LYNCH, JJ., concur with STEVENS, J. P.; KUPFERMAN, J., concurs in part in an opinion.

Order Family Court of the State of New York, New York County, entered on December 1, 1972, unanimously modified, on the law, to strike the finding of neglect and to remand the matter to Family Court for a hearing on that issue and, as so modified, the order is otherwise affirmed, without costs and without disbursements. Order of said court entered on June 18, 1973, unanimously reversed, on the law, without costs and without disbursements.

Chart No. 57

HOSPITAL

08-21-76

CONTINUATION RECORD

SURNAME	FIRST	MIDDLE	SEX	AGE	DATE ADMITTED	WARD OR CLINIC
PEREZ	PAULINE		F	38	10-31	NCS

MS. Pt is a pleasant easygoing young woman who smiles readily and relates well. Responds to questions show coherent and relevant thinking, although occasionally a question is simply not answered unless repeated. Her replies are sometimes incomplete eg not listing total hospitalizations when asked, Memory of some past events poor, although she remembered names of children's fathers

Affect appropriate, mood neutral. She is oriented, but seems unconcerned and unconvinced of illness. She is concerned about returning home. While she feels there sleepless nights will come again, the prospect doesn't seem to trouble her

Imp - Mild paranoid schizophrenia - the woman's situation is exacerbated by conflict between over marriage and her desire to have her children at home. She attempts to solve these problems unsuccessfully by relying on her religion

P Brunell / sukho

Chart No. 08-21-76-5

HOSPITAL Bellevue

A. 145

ADMISSION RECORD

Surname First Middle	Sex	Age	Date of Birth	Date Admitted	Ward or Clinic
Perez Pauline	F	29	8/22/42	11/11/71	
Permanent Address	Nativity	Color	Other (Specify)		Marital Status
246 E - 6th St. N.Y.C.	P.R.	W. ☒ N. ☐	PR		(S.) M. W. D. L. S.
Occupation	Dates of Previous In-Patient Admissions				
Unempl	?				

FOR IN-PATIENT SERVICE ONLY

On discharge record the following data; Use Terms and Codes of Standard Nomenclature

Date discharged ______ Condition: Improved ☐ Unimproved ☐ Not Treated ☐ A.O.R. ☐ Died ☐

Final diagnosis: Main Condition ______ Code No. ______

Additional Conditions ______ Code No. ______

Code No. ______

Service ______ Visiting Dr. ______ House Dr. ______

In the following report include: FAMILY HISTORY; hereditary conditions and causes of family deaths.

PREVIOUS HISTORY: habits, occupation, childhood diseases, other diseases, operations and injuries.

PRESENT CONDITION: Date and mode of onset, possible cause, course, and review of systems. For trauma, include cause and time of injury.

29 y o PRo [illegible] after medical clearance in AES. She [illegible]
the [illegible] her [illegible] previous hospitalization [illegible]
BPH in 1969. Current problems stem from her confusion
over what is happening c̄ her 7 y o daughter, Maria, whom
she apparently placed for adoption without being aware of
it. Previous suicidal attempt at age 16 also [illegible]
of the [illegible] with her.
MSE: alert Oriented x3. affect [illegible] Mood depressed. [illegible]
suicidal thoughts. Associations somewhat loose. Some
[illegible] & delusional ideas concerning the [illegible]
in her - accounts to [illegible] of her [illegible]. The [illegible]
auditory hallucinations. Memory intact. [illegible], judgment [illegible]
[illegible] present
Imp: Chronic Schizophrenia vs. [illegible]
Plan: Admit for evaluation, [illegible]
clarification [illegible] c̄ child would be helpful.
[illegible] previous suicidal [illegible] at this time
in this [illegible]

Date 11/11/71 Signature Lehmann

THE CITY OF NEW YORK—DEPARTMENT OF HOSPITALS

S.R. 5001-(Rev. 66)-606M-701202-38(69)

Lower Manhattan Aftercare Clinic

PEREZ, PAULINE

Central Islip State Hospital

February 25, 1970: Patient reports to the Aftercare clinic for orientation alone. She is a 27 year-old woman who presents a neat and clean appearance and is fairly attractive. She says that she went on December 1, 1969 to the hospital because she got upset when her baby got sick. She was discharged from Central Islip State Hospital on February 11, 1970. She is taking 50 mgs. of Thorazine t.i.d. She says that she had her first admission in 1962 at which time she was hospitalized for 8 months and the second time in 1967 at which time she was hospitalized for a period of 2 months. Presently, she is living in her own apartment by herself. She has three children, two of them are here and one five-year is in Puerto Rico. One child 8 months and another child 7 years old are presently taken care of in a catholic home. Patient wants to fix up her apartment at 647 East 6th Street, New York City and then she wants to get the children back. She states that since she has been back from the hospital she has been eating, sleeping and feeling well. She denies all trends and she specifically denies depressions, hallucinations and being upset. She is being supported by welfare.

Next appointment March 20, 1970.

Edward Schattner, M.D.
Psychiatrist II

SS t: 2/26/70

March 20, 1970: Patient reports to the clinic promptly. She presents an attractive appearance, she is friendly and in good contact. She states that she has been eating, sleeping and feeling well. She has been spending her time cleaning her house, and visiting with her mother and brother who are living in the neighborhood. She has been eating out. She denies the usual trends and no psychopathology is presently in evidence. Her only concern is that she was trying to have her children back. She has seen her son once but she does not know how to travel to visit her other child. She was told to take the matter up with the Welfare Department who has placed her children. Patient is being maintained on 50 mg of Thorazine t.i.d. and she is comfortable on this medication. Next appointment April 20.

EM T:3/23/70

Edward Schattner, M.D.
Psychiatrist II

PEREZ, PAULINE
CISH

April 24, 1970: Patient reports to the clinic promptly. History reveals that patient is a 27 year old single woman who had her first admission to a mental hospital on January 22, 1968 when she had hallucinations and delusions and became quite disturbed. Patient herself claims that she had a previous admission in 1962 but record at CISH did not reveal any previous admission. Patient was discharged on February 11, 1970 on 50 mg of Thorazine t.i.d., after she had been on a voluntary application. AZ test was done on January 24, 1970 and it was considered to be positive. During the interview patient presented a neat and clean appearance and she was attractively dressed. She is friendly, cooperative, and in good contact. She states that she has been eating, sleeping and feeling well. She denies all trends, and she specifically denies hallucinations, delusions, and depression. She says that she would like to have her children back and take care of them. Her older child, Daniel, is 7 years old, and the other child, Maricol is 10 months old. They are being taken care of by the BCW, Dept. of Soc. Services. They wrote a letter, requesting [illegible] information on the patient, as to her ability to care for the children. Patient says that in her neighborhood the mother lives, the brother and the whole family is there. Patient has a 4-room apartment at 646 East 6th St. NYC and she has already gotten furniture and she needs some dishes. She says that she is not pregnant because she has gotten her period this month and the month before. Patient has no particular problems to discuss other than that she wants the children, and no overt psychopathology is presently in evidence. She is being maintained on 50 mg of Thorazine t.i.d. and her next appointment is on May 25.

TM t:4/27/70

Exward Schattner, M.D.
Psychiatrist II

May 25, 1970: Patient reports to the clinic promptly. She presents an attractive appearance, she is friendly and in good contact. She admits that she had been hospitalized eight times since 1962. The first time was in CISH and all the other times was in PS[illegible]. Her longest hospitalization was 8 months at CISH and the shortest hospitalization was for a period of two months. Patient states that her mother, Mrs. Josephine DUchesse lives at 360 East 4th Street and her brother lives atHector Palace 520 East 11 Street. Her father, Michael Perez, has come from Puerto Rico and will live with patient's brother at 520 East 11 Street. She says that her family is willing to help her with the care of the children. They all live very closeby where the patient is living. In view of the situation and the absence of mental symptoms at the present time, This examiner has no objections for the patient to get the children back if all other arrangements can be made. Patient is being maintained on 150 mg of Thorazine t.i.d. Next appointment June 29.

TM t:5/27/70

Edward Schattner, M.D.
Psychiatrist II

LOWER MANH. AFTERCARE CLINIC

PEREZ, PAULINE CISH

SULLIVAN, ARNEH
P-15

June 23, 1970: Patient reports to the clinic promptly. She presents an attractive appearance, she is friendly and in good contact. She says that her older child was home for the weekend and everything went out well. She asked whether she can do something because every time she is having her period, she is in pain. Other than that she has no problems. She also wonders whether her children will be given to her. Patient is being maintained on 50 mg of Thorazine t.i.d. Next appointment July 22.

TM t:7/2/70

Edward Schattner, M.D.
Psychiatrist II

July 22, 1970: Patient reports to the clinic promptly. She presents an attractive appearance, she is friendly and in good contact. She says that she has been eating, sleeping and feeling well. She denies the usual trends, and no overt psychopathology is presently in evidence. She is taking 50 mg of Thorazine t.i.d. and she has been comfortable on this medication. Her only complaint is that she wants her children back. She says that she is going to have on 8.8. - 8/16 her son home. Apparently, Bureau of Child Guidance seems to give her patient more and more responsibility. Patient was given a clinic supply of medication and her next appointment is on September 16.

TM t:7/23/70

Edward Schattner, M.D.
Psychiatrist II

September 30, 1970: Patient reports to the clinic promptly. She came in early in the morning without an appointment. She presents an attractive appearance, she is friendly and in good contact. She says that she had missed her last appointment because she went to Puerto Rico. She was there from September 14 until September 28. She states that her father wanted to sell his house but he could not find a buyer as yet. He plans to come to New York to live here. Patient says that she enjoyed her trip. She said that while in Puerto Rico, she was tired once and she went to a doctor. He gave her some white pills which are called "nutrition pills". He told her that she is not "crazy" and that medication she is getting from this clinic is not strong for her. Patient was told that as long as she is coming to this clinic, she has to accept the treatment of this clinic. Patient seemed to be agreeable. She continues to habe only one desire, that is, to have her children back. Next appointment October 28.

TM t:10/6/70

Edward Schattner, M.D.
Psychiatrist II

PEREZ, PAULINE
CISH

October 28, 1970: Patient reports to the clinic promptly. She is adequately dressed, friendly and in good contact. She says that she sleeps during the day but she does not sleep at night well. Upon further questioning it transpires that patient does to sleep at 7 p.m. and wakes up at 3 a.m, this making eight hours sleep anyway. Patient was told to take her medication as follows: first tablet after breakfast, the second tablet after supper at around 7 p.m. and one tablet before retiring around 11 p.m. Patient says that she has gotten a new apartment at 340 East 4th Street, apt.#24. This apartment is in the same block where her mother lives and it is a four room apartment. Presently patient is busy cleaning the apartment and to get it in shape. Patient is being maintained on 50 mg of Thorazine t.i.d. She denis hallucinations and delusions. Next appointment November 2?

TM t:10/29/70

Edward Schattner, M.D.
Psychiatrist II

February 10, 1971: Patient reports to the clinic after she was advised through a letter to come today. She has not been in the clinic since the end of October. When seen today, patient was dressed in a dress and she presented an attractive appearance. She sais that she did not come to the clinic because "I was feeling good.". During the month of November patient went voluntarily to Bellevue and stayed there for a period of two weeks. She sais that she did not hear voices but she was feeling nervous. She said that she got medication from Bellevue And she has been taking her medication all along. She continues to live in her own apartment at 646 East 6th Street and she has been taking care of the place, going shopping and doing her own cooking and cleaning. Her only concern remains that she wants her children back. She states that she has been eating and sleeping well. She has been taking 50 mg of Thorazine t.i.d. and she has been comfortable on this medication. Next appointment March 10.

TM t:2/25/71

Edward Schattner, M.D.
Psychiatrist II

March 10, 1971: Patient reports to the clinic promptly. She makes a good appearance, is cooperative and is in good contact. She states that she has been eating, sleeping and feeling well. Her only complaints is that she still has not gotten her children back. She was referred to social worker to discyss this problem. She is being maintained on 50 mg of Thorazine t.i.d. and she is comfortable on this medication. She was given a clinic supply of medication and her next appointment is on April 7.

TM t:3/15/71

Edward Schattner, M.D.
Psychiatrist II

LOWER MANH. AFTERCARE CLINIC

PEREZ, PAULINE CISH

May 3, 1971: Patient reports to the clinic for her appointment, after she had failed her last appointment a month ago. She presents an active appearance and she is in good contact. She says that she did not keep her last appointment because " I was feeling good." Patient says that sometimes when she is getting bad; her heart starts beating and that is the only thing which bothers her. She says that she has a boy friend. When he is playing cards and he is losing, she gets angry. She has been visiting with her children and she again is pressuring to get the children back. She also states that her mother wants to move to California and patient wants to go there too with the children. Patient is being maintained on 50 mg. of Thorazine b.i.d. Next appointment June 2.

TM t:5/5/71

Edward Schattner, M.D.
Psychiatrist II

May 25, 1971: She came in complaining that since last night she is not feeling too well, she hsd a funny feeling of heaviness in her head. She denied hearing voices. She could not sleep last night, and she threw up today. She is attending a prenatal clinic, she is pregnant and expects to deliver a baby at the end of September. She is living with her husband. Patient is in contact, oriented, polite but moderately anxious. We advised her to continue taking Thorazine and in addition she will have a few pills of Equanil. She was instructed to take one pill of Equanil at bedtime. If she is not feeling better she should come here to see her regular doctor, who is Dr. Schattner.

TM t:6/3/71

Michael Jackamets, M.D.
Psychiatrist II

June 15,1971: Patient reports to the clinic without an appointment alone. The social worker reported that patient felt faint while in the clinic and she had to rest in the nurse's office. When seen later, patient said that she is six months pregnant. She had no explanation while she did not reveal this to the undersigned before. She says that the father of the baby is living with her but they do not have the benefit of a marital relationship. She claims that she did not keep her scheduled appointment because she lost her card. She states that she has been feeling dizzy several times during the past month and on one occasion she fell to the floor. She has on her own reduced the medication to 50 mgs., of Thorazine at night time only, because during the day she was too dizzy. She denies hallucinations and depressions. She has been attending Beth-Israel Clinic and she has been getting Vitamins there and they are they are taking x-rays. In view of the fact that patient had been having dizzy spells and had been feeling rather weak, medication will be reduced to 50 mgs., of Thorazine at night. Patient said that she had been in touch with the Legal Aid Society and that she had requested the oldest son be returned to her. This examiner at the present time is against such an arrangement, and the patient was told so. She was quite upset about this but nevertheless she was told that this recommendation will be maintained. She was told that if the doctor at Beth-Israel hospital feels that she can take care of another child that he should make the recommendation from his point of view. She was given a clinic supply to last her for one month of medication.

(continue)

PEREZ, PAULINE ID.# 108 80 97
(Central Islip State Hospital)

June15,1971: (continued)...

Arrangement for the next appointment will be made by the social worker. This is a patient from Unit "C", and the next time she will be seen by the Unit doctor.

Edward Schattner, M.D.
ED T 6/17/71 Psychiatrist II

July 12, 1971: The patient is expecting to have a baby in September of this year. She is under the care of a prenatal clinic. Three other of her children are in placement. She insists that at least one of them should be returned to her care now. She is a very superficial mentally individually with no good judgement. She says she will go to the courts to force her demands. She is taking one pill of Thorazine 50 mg. at bedtime. Emotionally she is flat and somewhat tense.

M. Jackamets, M.D.
ED T 7/12/71 Psychiatrist II

November 1,1971: Patient came in carrying her little baby on her arm. The baby was born on September 21,1971. The patient is taking care of the baby without assistance from anybody. She insists that her youngest child a 2 year old girl be returned to her care. The baby is presently in placement, and the patient claims that she is in touch with a lawyer and the case will be evaluated in Court. The patient receives no medication from this clinic, she is feeling all right. The baby seems to be taken good care off and the patient herself is clean and in good general health. She shows no signs of disturbing symptoms, at the present time. Next appointment is November 30, 1971.

Michael Jackamets, M.D.
ED T 11/8/71 Psychiatrist II

December 9,1971: Patient came in alone because her baby is in the hospital with infected ear. The patient said she did not hear any news regarding her request to have her 2 year old child returned to her care. She was quiet today, polite, shows no signs of nervous tension or excitement. She claims she continues taking her medication as ordered. She was clean, neat in her appearance, well dressed and in good general health. Return appointment is January 13,1972, at 9:00 A.M.

Michael Jackamets, M.D.
ED T 12/15/71 Psychiatrist II

January 28,1972

Lisa H. Blitman, Attorney
NYC Legal Services, Inc.
Cap Projects
320 East 3rd Street
New York, New York 10009

RE: Perez, Pauline
646 East 6th Street
New York, New York
Id. # 108 80 97

Dear Counselor Blitman:

Pursuant to our conversation today and replying also to your letter of November 24,1971 with a request for psychiatric information on the above-named, I wish to inform you as follows:

Miss Perez has a history of two psychiatric admissions, because of emotional condition. First to Pilgrim State Hospital in 1968, and the second to Central Islip State Hospital in 1970. Miss Perez has been under the care of this clinic since February 25, 1970, and she was seen here at regular monthly intervals by a clinic psychiatrist. She was last seen by me on January 13,1972, and she was found free of signs and symptoms of psychosis and in good contact. She had been well cooperative with the clinic services since her release from the hospital and she has shown no regressive trend in her mental health throughout this period of time. She will continue under the supervision and care of this clinic. Patient is taking complete care of her youngest child, and she shows her sincere interest in her other two children, requesting their return to her care. In view of the absence of mental symptoms at the present time I am of the opinion that the patient is capable of taking care of her children, and I have no objections for the patient to get the children back, although possibly one at a time.

Yours truly,

MV/FD

Michael Jachemets, M.D.
Clinic Psychiatrist

LOWER MANHATTAN AFTERCARE CLINIC

pPEREZ, PAULINE

108 80 97

CENTRAL ISLIP STATE HOSPITAL

January 12,1972: Patient came in carrying her 4 months old baby. The baby is well nourished, clean and appeared to be in good care. The patient appeared very fond of the child, and again she expressed her sincere desire to have her other two children with her . While waiting for the Court's decision and hearing, she gets a little bit impatient and at times while talking to various people either in the agency or in the Courts she raises her voice and becomes emotional. She is free of psychotic material, is polite and cooperative, and free of any delusional ideas. She seems to be competent to take care of the child. Today we discontinued her medication upon her request but we will continue seeing her in the clinic at intervals. Return appointment is March 13,1972, at 9:00 A.M.

Michael Jackamets, M.D.
Psychiatrist II

ED T 2/3/72

May 3,1972: Patient due here on March 13 and April 4,1972. She failed to come for these two appointments.

Michael Jackamets, M.D.
Psychiatrist II

ED T 5/4/72